राजपत्र, हिमाचल प्रदेश

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

शुक्रवार, 12 मई, 2017 / 22 वैशाख, 1939

हिमाचल प्रदेश सरकार

HIGH COURT OF HIMACHAL PRADESH, SHIMLA-171 001

NOTIFICATION

Shimla, the 4th *May,* 2017

No. HHC/GAZ/14-315/2010.—Hon'ble the Acting Chief Justice has been pleased to grant *expost facto* sanction of 01 days commuted leave for 11-4-2017 in favour of Shri Nikhil Aggarwal, Civil Judge-*cum*-JMIC, Jawali, District Kangra, H. P.

Certified that Shri Nikhil Aggarwal has joined the same post and at the same station from where he proceeded on leave, after expiry of the above period of leave.

Also certified that Shri Nikhil Aggarwal would have continued to hold the post of Civil Judge-*cum*-JMIC, Jawali, District Kangra, H. P., but for his proceeding on leave for the above period.

By order,
Sd/-
Registrar General.

HIGH COURT OF HIMACHAL PRADESH SHIMLA -171001

NOTIFICATION

Shimla, the 6th *May,* 2017

No.HHC/GAZ/14-266/03.—Hon'ble the Acting Chief Justice has been pleased to grant 135 days' maternity leave *w.e.f.* 23-12-2016 to 06-05-2017 and 21 days' earned leave *w.e.f.* 07-05-2017 to 27-05-2017 with permission to suffix Sunday falling on 28-05-2017 in favour of Smt. Sapna Pandey, Senior Civil Judge-*cum*-CJM, Una, H.P.

Certified that Smt. Sapna Pandey is likely to join the same post and at the same station from where she proceeds on leave, after expiry of the above period of leave.

Also certified that Smt. Sapna Pandey would have continued to hold the post of Senior Civil Judge-*cum*-CJM, Una, H.P., but for her proceeding on leave for the above period.

By order,
Sd/-
Registrar General.

LABOUR AND EMPLOYMENT DEPARTMENT

NOTIFICATION

Shimla, the 3rd *May,* 2017

No. Shram (A) 6-1/2017 (Awards).—In exercise of the powers vested under section 17 (1) of the Industrial Disputes Act,1947, the Governor Himachal Pradesh is pleased to order the publication of awards of the following cases announced by the Presiding Officer, Labour Court Shimla on the website of the Department of Labour & Employment Government of Himachal Pradesh:—

Sr. No.	Reference/ Application	Title	Section
1.	Ref.01/2016	Sh. Dinesh Kumar V/s The Executive Engineer, HPPWD Division Dhami (Rural) District Shimla & Anr.	10

2.	Ref.52/2016	Sh. Dil Bahadur V/s The Executive Engineer, HPPWD, Division No-1, Shimla & Anr.	10
3.	Ref.28/2014	Workers Union V/s M/S Wildcraft India Private Limited, Plot No-1, Industrial Estate, Chambaghat, District Solan, H.P.	10
4.	Ref.35/2010	Smt. Manswani V/s M/S P.A. Time Industries Ltd. Dharampur District Solan, H.P.	10
5.	App.15/2015	Sh. Subhash Chand V/s Manager, Chimal Health Padmalaya, Kather, District Solan, H.P.	
6.	Ref.80/16	Sh. Narender Singh V/s The Executive Engineer, I & PH Division No-II, Shimla, H.P.	10
7.	Ref.89/2013	Sh. Akhter Ali V/s Himalya International Ltd. H.O. Subhkhera, Poanta Sahib District Sirmour, H.P.	10
8.	Ref.01/2014	Sh. Pawan Kumar V/s Himalya International Ltd. H.O. Subhkhera, Poanta Sahib District Sirmour, H.P.	10
9.	Ref.02/2014	Sh. Alok Sharma V/s Himalya International Ltd. H.O. Subhkhera, Poanta Sahib District Sirmour, H.P.	10
10.	Ref.82/2015	Sh. Ram Lal V/s The Divisional Forest Officer, Forest Division Chopal District Shimla, H.P.	10
11.	Ref.69/2009	Sh. Jagdish Kumar V/s M/S Rexine Pharmaceuticals (P) Ltd. Village Katha, Baddi District Solan.	10
12.	Ref.71/2009	Sh. Amit Kumar V/s M/S Rexine Pharmaceuticals (P) Ltd. Village Katha, Baddi District Solan.	10
13.	Ref.70/2009	Sh. Dinesh Kumar V/s M/S Rexine Pharmaceuticals (P) Ltd. Village Katha, Baddi District Solan.	10
14.	Ref.66/2014	Sh. Thakur Singh V/s The Divisional Forest Officer, Shimla, H.P.	10
15.	Ref.09/2015	Sh. Rukam Ram V/s Divisional Forest Officer, Anni Forest Division Luhri, Tehsil Ani District Kullu, H.P.	10
16.	Ref.28/2012	Sh. Gauri Pratap Shankar V/s The General Manager M/S Gables India Pvt. India Ltd. Mashobra, District Shimla, H.O.	10
17.	Ref.13/2017	Sh. Trilok Singh V/s The Factory Manager M/S Zee Laboratories Ltd. Gondpur, Tehsil Poanta Sahib District Sirmour, H.P.	10
18.	Ref.24/2016	Sh. Mulkh Raj V/s M/S Indo Farm Equipment Ltd., Village Thana, Baddi District Solan, H.P.	10

By order,
R.D. DHIMAN, IAS
Pr. Secretary (Lab. & Emp.).

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Ref no. 01 of 2016.

Instituted on 1.1.2016.

Decided on 14.3.2017.

Dinesh Kumar S/o late Shri Nikka Ram R/o Village Manand, P.O Jalog, Tehsil Sunni, District Shimla, HP. ...*Petitioner.*

VS.

1. The Executive Engineer, HPPWD Division Dhami (Rural), District Shimla, HP.

2. Sub Divisional Officer, HPPWD Sub Division Jalog, Tehsil Sunni, District Shimla, HP. ...*Respondents.*

Reference under section 10 of the Industrial Disputes Act, 1947.

For petitioner : Shri Neel Kamal Sood, Advocate.

For respondents : Ms. Reena Chauhan, Dy. DA.

AWARD

The reference for adjudication, sent by the appropriate government, is as under.—

"***Whether termination of the services of Dinesh Kumar S/o late Shri Nikka Ram R/o Village Manand, P.O Jalog, Tehsil Sunni, District Shimla, HP by the Executive Engineer HPPWD Division Kumarsain District Shimla, HP during June, 1996 without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view the delay of more than 18 years in raising the industrial dispute, what amount of back-wages, seniority, past service benefits and compensation the above aggrieved workman is entitled to from the above employer?"***

2. Facts, in brief are that w.e.f. June, 1995, initially the petitioner was appointed as beldar on daily wages basis and worked till December, 1996 and thereafter his services had been orally terminated by the respondents without any reason and without serving any prior notice upon him as required under law and that too without complying with the provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is further stated that after his appointment, the petitioner worked at various places under respondents and his services had been terminated without serving any prior notice as required under section 25-F of the Act and without payment of compensation. The respondents had engaged many fresh persons after the illegal termination of the petitioner and even many juniors were also retained and his services had been terminated in violation of the provisions of sections 25-G and H of the Act. The petitioner had completed 240 days in twelve calendar months preceding his termination. It is also stated that the petitioner visited the office of respondents for his reengagement but of no avail. Against this back-drop a prayer has been made that the respondents be directed to re-instate the petitioner in service along-with all consequential benefits including back-wages.

3. By filing reply, the respondents contested the claim of the petitioner wherein preliminary objections have been taken that the petition is time barred and not maintainable. On merits, it has been asserted that the petitioner was engaged as daily wager beldar during the month of June, 1995 and worked upto September, 1996 and thereafter he himself had left the job at his own. It is further asserted that the services of the petitioner were never terminated and he also failed to complete 240 days in any calendar year prior to his leaving of job. The petitioner neither approached the respondents regarding his re-employment nor he had made any representation to this effect. It is denied that the juniors have been retained. The respondents prayed or the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondents.

5. On the pleadings of the parties, the following issues were framed on 5.9.2016.

1. Whether the termination of the services of the petitioner during June, 1996 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what service benefits the petitioner is entitled? ...*OPP.*

3. Whether the present petition is time barred as alleged? ...*OPR.*

4. Whether the claim is not maintainable as alleged? ...*OPR.*

5. Relief.

6. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no. 1 Yes.

Issue no. 2 Entitled to reinstatement with seniority and continuity from the date when the petitioner raised demand notice but without back-wages.

Issue no.3 No.

Issue no.4 No.

Relief. Reference partly decided in favour of the petitioner and against the respondents per operative part of award.

Reasons for findings

Issues no.1 & 3.

8. Being interlinked both these issues are taken up together for decision.

9. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondents illegally without serving him any notice as required under section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the petitioner represented several times for his reengagement but of no avail and even junior persons to the petitioner are still working with the respondents and fresh workers have been engaged.

10. On the other hand, Ld. Dy. DA for the respondents contended that the services of the petitioner had never been terminated by the respondents, who himself had abandoned his job without intimation to the respondents. She further contended that the petitioner had raised the industrial dispute after a gap of about 18 years, hence, at this stage, he is not entitled to any relief as prayed for.

11. To prove issue no.1, the petitioner examined two PWs. He himself appeared into the witness box as PW-1 and tendered in evidence his affidavit Ex. PW-1/A wherein he reiterated almost all the averments as stated by him in the claim petition. He also tendered in evidence list of junior workers under Jalog Sub Division Ex. PW-1/B, letters dated 24.2.2016 Ex. PW-1/C and Ex. PW-1/D and seniority list Ex. PW-1/E. In cross-examination, he admitted that he had worked for 130 days in the year, 1995. He denied that he had worked for 227 days in the year, 1996 and that he had left the job at his own. He admitted that he raised the present dispute after 18 years. He denied that no juniors to him were retained by the department. He further denied that the persons mentioned in the list Ex. PW-1/B to Ex. PW-1/D were not his juniors.

12. PW-2 Shri Tej Ram, Senior Assistant from the office of Assistant Engineer (B&R), Sub Division Jalog has stated that the petitioner was engaged in June, 1995 on muster roll basis and worked till September, 1996. He further stated that the list of mandays chart Ex. PW-2/A is correct as per the record and lists Ex. PW-1/B to Ex, PW-1/D have been prepared by their office. In cross-examination, he admitted that the petitioner had left the job at his own and he never approached the department for his reengagement. He further admitted that the persons mentioned in the list Ex. PW-1/B to Ex. PW-1/D were not juniors to the petitioner.

13. The respondent has examined one Shri Rajeev Shaunak, Assistant Engineer as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as stated in the reply. In cross-examination, he admitted that neither any notice nor compensation was given to the petitioner as required under section 25-F of the Act. He denied that as per Ex. PW-1/A, the petitioner had completed 240 days in a calendar year preceding his termination. He admitted that the services of the petitioner were engaged in the month of June, 1995. He further admitted that all the persons mentioned in Ex. PW-1/B and Ex. PW-1/D are juniors to the petitioner and they are still continuing with the department and their services have been regularized. He also admitted that as per law no notice had been issued to the petitioner to resume his duties and that before engaging the services of fresh/junior persons, the petitioner was not called by the department.

14. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof the first question which arises for consideration before this Court is as to whether the petition is time barred. It is not in dispute that the petitioner had worked till September, 1996 with the respondents and he raised the industrial dispute after a gap of about 18 years. The law on the point is well settled that no limitation is prescribed either under the Industrial Disputes Act or under the Limitation Act for raising the Industrial Dispute. The Hon'ble Supreme Court in its various judgments has held that the relief under the Industrial Disputes Act cannot be denied to the workman merely on the ground of delay. It has been held by the Hon'ble Supreme Court in ***in (1999) 6 SCC 82, titled as Ajayab Singh Vs. Sirhind Co-operative Marketing–cum- processing Service Society Limited and Another.*** *that.—*

> ***"The provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone"***

It has also been held by the Hon'ble Supreme Court in **Gurmail Singh Vs. Principal Government College of Education and others, (2009) 9 SCC 496** that mere delay in challenging the termination would not be a bar to the adjudication of the matter but could only deprive the appellant of his back wages for the period of delay in raising the termination issue. In a latest

judgment, the **Hon'ble Supreme Court in 2014, 10 SCC 301 titled as Raghubir Singh Vs. General Manager, Haryana Roadways Hissar** has held that Limitation Act has no application to reference made by the appropriate government to Labour Court/Industrial Tribunal for adjudication of existing industrial dispute. The relevant portion of the aforesaid judgment is reproduced as under.—

> **"16 Further, the workman cannot be denied to seek relief only on the ground of delay in raising the dispute as held in the case of S.M. Nilajkar & Ors. v. Telecom District Manager, Karnataka it was held by this Court as follows:—**
>
> **"17. It was submitted on behalf of the respondent that on account of delay in the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree..... In Ratan Chandra Sammanta and Ors. v. Union of India and Ors. (supra)1993 AIR SCW 2214, it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief....." (Emphasis supplied).**

17 In view of the legal principles laid down by this Court in the above judgment, the reference of the industrial dispute made in the case on hand by the State Government to the Labour Court to adjudicate the existing industrial dispute between the parties was made within a reasonable time, considering the circumstances in which the workman was placed, firstly, as there was a criminal case pending against him and secondly, the respondent had assured the workman that he would be reinstated after his acquittal from the criminal case. Moreover, it is reasonable to adjudicate the industrial dispute in spite of the delay in raising and referring the matter, since there is no mention of any loss or unavailability of material evidence due to the delay. Thus, we do not consider the delay in raising the industrial dispute and referring the same to the Labour Court for adjudication as gravely erroneous and it does not debar the workman from claiming rightful relief from his employer".

Therefore, the aforesaid law declared by the Hon'ble Supreme Court in various context makes the legal position clear that there is no limitation prescribed either under the Industrial Disputes Act or under the Limitation Act for raising the industrial dispute. The provision of Article 137 of the schedule to the Indian Limitation Act, 1963 is not applicable to the proceedings under the Act and the relief under the Industrial Disputes Act cannot be denied to the workman merely on the ground of delay.

15. In the back-ground of the aforesaid legal position, in the instant case, the services of the petitioner were terminated in September, 1996. Thereafter, the petitioner raised the Industrial Dispute and the matter was referred to Labour-cum-Conciliation Officer, who submitted the failure report to the Labour Commissioner. However, the Labour Commissioner refused to make the reference on the ground of delay and latches. Thereafter, the petitioner filed CWP no. 4348 of 2015 before the Hon'ble High Court of HP wherein the Hon"ble High Court vide its order dated 18.11.2015 directed the Labour Commissioner to make the reference to the Labour Courtcum-Industrial Tribunal and thereafter the present reference has been received by this Court for adjudication. Hence, the petitioner cannot be blamed for delay. Moreover, it is not the case of the respondents that due to the delay in raising the industrial dispute, there is any loss or unavailability of material evidence. Hence, it cannot be said that delay in raising the industrial dispute is fatal to the reference and as such the petitioner cannot be debarred from claiming the relief from his

employer and mere delay in challenging the termination would not be a bar to the adjudication of the present dispute which has been referred to this Court by the appropriate government.

16. The learned ADA for the respondent next contended that the petitioner had left the job at his own after September, 1996. However, there is no iota of evidence on record which could go to show that the petitioner had left the job on his own as no notice or letter regarding abandonment of the job by the petitioner is placed on record by the respondent. Even RW-1 Shri Rajeev Shaunak, Assistant Engineer, has admitted in cross-examination that no notice was issued to the petitioner to resume the duties. Therefore, in the absence of any evidence on record, inference cannot be drawn that the petitioner had abandoned the job. Reliance is placed on decision reported in **AIR 1979 SC 582 case titled as G.T Lad and others Vs. Chemicals and Fibers India Ltd.** where it has been held that—

> **"From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. v. Venkatiah (1964) 4 SC R 265: (AIR 1964 SC 1272), it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."**

Hence, in view of the law laid down (supra), and also in view of the evidence led by the parties, it cannot be said that the petitioner had left the job at his own.

17. From the closer scrutiny of the record, it has become clear that initially the petitioner was engaged as beldar on daily wages basis by the respondents in the month of July, 1995 and worked as such till September, 1996. Admittedly, as per mandays chart Ex. PW-2/A, the petitioner had worked for 130 days in the year, 1995 and 227 days in the year, 1996. From the mandays chart Ex. PW-2/A, it is also clear that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is also an admitted fact that neither any notice had been issued to the petitioner nor he was paid compensation. Therefore, before terminating the services of the petitioner, it was incumbent upon the respondents to have complied with the provisions of section 25-F of the Act which lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the employer to comply with those conditions as per clauses (a) to (c) which are mandatory in nature. However, in the present case, the perusal of the record shows that the respondents have failed to comply with the provisions of section 25-F of the Act. **In (2015) 4 SCC 544, Mackinnon Mackenzie and Company Ltd., Vs. Mackinnon employees Union**, the Hon"ble Apex Court has held as under:—

> "34. ……**The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the**

retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F clauses (a) and (c) of the I.D. Act which are mandatory in law."

18. In the present case also as observed aforesaid, the respondents have failed to comply with the provisions of section 25-F of the Act before terminating his services. Hence, In view of the law laid down by the Hon'ble Supreme Court (supra) and my foregoing observations, I have no hesitation in holding that the termination/disengagement of the services of the petitioner during September, 1996 by the respondents without complying with the provisions of section 25-F of the Act, is illegal and unjustified.

19. The learned counsel of the petitioner next contended that at the time of the termination of the petitioner, the respondents had retained his juniors who are still working and besides this even fresh persons have been engaged by the respondents as such the respondents had violated the principles of "last come first go". It has been admitted by RW-1 Shri Rajeev Shaunak, Assistant Engineer, in his cross-examination that all the persons mentioned in Ex. PW-1/B and Ex. PW-1/D are juniors to the petitioner and they are still continuing with the department and their services have been regularized. He further admitted that as per law no notice had been issued to the petitioner to resume his duties. He also admitted that before engaging the services of the fresh/junior persons to the petitioner, the petitioner was not called by the department. Thus, from the evidence, on record, it has been established that after the disengagement of the services of the petitioner, junior persons have been retained and fresh workers have been engaged by the respondents without giving an opportunity to the petitioner for re-employment, which is clear cut violation of section 25-G& H of the Act.

20. Thus, having regard to entire evidence on record and in view of above cited rulings and my foregoing observations, I have no hesitation in holding that the termination of the services of the petitioner during September, 1996, by the respondents without complying with the provisions of the Act, is illegal and unjustified. Accordingly, both these issues are decided in favour of the petitioner and against the respondents.

Issue no. 2.

21. Since I have held under issues no.1 & 2 above that the termination of services of the petitioner by the respondents without following the provisions of the Act is illegal and unjustified. Now, it has to be seen as to what service benefits the petitioner is entitled. Admittedly, the present dispute has been raised by the petitioner after a gap of 18 years, hence, keeping in view all the facts and circumstances of the case, the petitioner is held entitled to reinstatement in service with seniority and continuity with effect from the date when he raised the demand notice.

22. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

23. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that .—

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

24. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Moreover, the petitioner had raised the present dispute after a gap of about 18 years, hence, the back-wages cannot be granted to him after such a long gap of 18 years. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

Issue No. 4.

25. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication and I find nothing wrong with this petition which is perfectly maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity with effect from the date when he raised the demand notice. However the petitioner is not entitled to back wages as such the reference is ordered to be answered in favour of the petitioner and against the respondents. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 14th Day of March, 2017.

(SUSHIL KUKREJA)
Presiding Judge, Industrial
Tribunal-cum-*Labour Court, Shimla.*

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-**LABOUR COURT, SHIMLA**

Ref no. 52 of 2016.

Instituted on 16.6.2016.

Decided on 22.3.2017.

Dil Bahadur S/o Shri Narender R/o Barrier, P.O Boileaugang, Tehsil & District Shimla, HP.
...Petitioner.

VS.

3. The Executive Engineer, HPPWD Division No.1Shimla, HP.

4. SDO, HPPWD Sub Division No.1 Shimla, HP. *...Respondents.*

Reference under section 10 of the Industrial Disputes Act, 1947.

For petitioner : Shri Ashwani Kumar Gupta, Advocate.

For respondents : Ms. Reena Chauhan, Dy. DA.

AWARD

The reference for adjudication, sent by the appropriate government, is as under.—

"***Whether alleged termination of the services of Shri Dil Bahadur S/o Shri Narender R/o RTO (Barrier), Tehsil & District Shimla HP during Jan., 2001 by the Executive Engineer, HPPWD Division no.3, Shimla HP who had worked as beldar on daily wages completing more than 240 days in the years, 1998, 1999 and 2000 and has raised his industrial dispute after about 15 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view the delay of more than 15 years in raising the industrial dispute, what amount of backwages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"***

2. Facts, in brief are that w.e.f. 1997 to 2000, the petitioner was serving in HPPWD Division no.1 Shimla and in the year, 2000 his services were illegally retrenched by the respondents in violation of the mandatory provisions of section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred as to Act) and also in violation of the principles of "last come first go". It is further stated that persons junior to the petitioner are still serving in the division and that at the time of his disengagement neither any notice nor any sort of compensation was given to the petitioner which is mandatory in law. Against this back-drop a prayer has been made that the respondents be directed to re-instate the petitioner in service along-with all consequential benefits including back-wages.

3. By filing reply, the respondents contested the claim of the petitioner wherein preliminary objections have been taken that the petition is barred by limitation, barred by the principles of res-judicata and not maintainable. On merits, it has been admitted that the petitioner was engaged in the department under Shimla Division no.1 during the year, 1997 to 2000 and during the year, 1997 he had worked only for 76 days and thereafter he had worked upto the year, 2000 and he left the job at his own will without any intimation at the site work, hence, no violation of the Act has been made. It is submitted that juniors to the petitioner never abandoned their job and are still in continuous service till date. The petitioner never approached the department for his re-engagement and since the department had never disengaged his services, hence, no notice was served. The respondents prayed or the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondents.

5. On the pleadings of the parties, the following issues were framed on 1.10.2016.

1. Whether the termination of the services of the petitioner during Jan., 2001 by the respondents is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what service benefits the petitioner is entitled to? ...*OPP.*

3. Whether the present petition is not maintainable as alleged? ...*OPR.*

4. Whether the claim is barred by limitation as alleged? ...*OPR.*

5. Relief.

6. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1	Yes.
Issue no.2	Entitled to reinstatement with seniority and continuity from the date when the petitioner raiseddemand notice but without back-wages.
Issue no.3	No.
Issue no.4	No
Relief.	Reference partly decided in favour of the petitioner and against the respondents per operative part of award.

Reasons for findings

Issues no.1 & 4.

8. Being interlinked both these issues are taken up together for decision.

9. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondents illegally without serving him any notice as required under section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the petitioner requested several times orally for his re-engagement but of no avail and even junior persons to the petitioner are still working with the respondents.

10. On the other hand, Ld. Dy. DA for the respondents contended that the services of the petitioner had never been terminated by the respondents, who himself had abandoned his job without intimation to the respondents. She further contended that the petitioner had raised the industrial dispute after a gap of about 15 years, hence, at this stage, he is not entitled to any relief as prayed for.

11. To prove issue no.1, the petitioner appeared into the witness box as PW-1 to depose that he was engaged as daily waged labourer in HPPWD Division no.1 in the year, 1997 and

worked as such till the year, 2000. He further deposed that his services had been terminated without any notice and retrenchment compensation. He had completed more than 240 days in each calendar year. He also deposed that his junior Shri Sant Ram is still working with the respondents and he is unemployed after his termination. In cross-examination, he admitted that he had worked for 76 days in the year, 1997. He denied that he had left the job at his own in the year, 2000 and that he had not approached the department for his re-engagement. He further denied that no person junior to him was engaged by the department.

12. The respondents have examined one Shri Ravi Bhatti, Assistant Engineer as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as stated in the reply. He also tendered in evidence the copy of mandays chart Ex. RW-1/B, copy of muster roll for the month of July and August, 2000 Ex. RW-1/C and Ex. RW-1/D. In cross-examination, he admitted that neither any notice nor compensation was paid to the petitioner. He further admitted that no notice had been issued to the petitioner for resumption of his duties. He admitted that the workers who were engaged along-with the petitioner and who were juniors to the petitioner have been regularized. He denied that the petitioner had made representation/oral request after the year, 2000 for his re-instatement.

13. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof the first question which arises for consideration before this Court is as to whether the petition is time barred. It is not in dispute that the petitioner had worked till July, 2000 with the respondents and he raised the industrial dispute after a gap of about 15 years. The law on the point is well settled that no limitation is prescribed either under the Industrial Disputes Act or under the Limitation Act for raising the Industrial Dispute. The Hon'ble Supreme Court in its various judgments has held that the relief under the Industrial Disputes Act cannot be denied to the workman merely on the ground of delay. It has been held by the Hon'ble Supreme Court in ***in (1999) 6 SCC 82, titled as Ajayab Singh Vs. Sirhind Co-operative Marketing –cum- processing Service Society Limited and Another.*** *that:—*

> ***"The provisions of Article 137 of Limitation Act, 1963 are not applicable to the proceedings under the ID Act. The relief under the ID Act cannot be denied merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the Labour Court can be generally questioned on the ground of delay alone"***

It has also been held by the Hon'ble Supreme Court in **Gurmail Singh Vs. Principal Government College of Education and others, (2009) 9 SCC 496** that mere delay in challenging the termination would not be a bar to the adjudication of the matter but could only deprive the appellant of his back wages for the period of delay in raising the termination issue. In a latest judgment, the **Hon'ble Supreme Court in 2014, 10 SCC 301 titled as Raghubir Singh Vs. General Manager, Haryana Roadways Hissar** has held that Limitation Act has no application to reference made by the appropriate government to Labour Court/Industrial Tribunal for adjudication of existing industrial dispute. The relevant portion of the aforesaid judgment is reproduced as under:

> "16 **Further, the workman cannot be denied to seek relief only on the ground of delay in raising the dispute as held in the case of S.M. Nilajkar & Ors. v. Telecom District Manager, Karnataka it was held by this Court as follows:**
>
> **"17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the**

appellants. We cannot agree..... In Ratan Chandra Sammanta and Ors. v. Union of India and Ors. (supra)1993 AIR SCW 2214, it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief.....” (Emphasis supplied).

17 In view of the legal principles laid down by this Court in the above judgment, the reference of the industrial dispute made in the case on hand by the State Government to the Labour Court to adjudicate the existing industrial dispute between the parties was made within a reasonable time, considering the circumstances in which the workman was placed, firstly, as there was a criminal case pending against him and secondly, the respondent had assured the workman that he would be reinstated after his acquittal from the criminal case. Moreover, it is reasonable to adjudicate the industrial dispute in spite of the delay in raising and referring the matter, since there is no mention of any loss or unavailability of material evidence due to the delay. Thus, we do not consider the delay in raising the industrial dispute and referring the same to the Labour Court for adjudication as gravely erroneous and it does not debar the workman from claiming rightful relief from his employer”.

Therefore, the aforesaid law declared by the Hon“ble Supreme Court in various context makes the legal position clear that there is no limitation prescribed either under the Industrial Disputes Act or under the Limitation Act for raising the industrial dispute. The provision of Article 137 of the schedule to the Indian Limitation Act, 1963 is not applicable to the proceedings under the Act and the relief under the Industrial Disputes Act cannot be denied to the workman merely on the ground of delay.

14. In the back-ground of the aforesaid legal position, now coming to the facts of the present case. The services of the petitioner were terminated in July, 2000. Thereafter, the petitioner raised the Industrial Dispute and the matter was referred to Labour-cum-Conciliation Officer, who submitted the failure report to the Labour Commissioner. However, the Labour Commissioner refused to make the reference on the ground of delay and latches. As per the reference sent to this Court for adjudication by the Labour Commissioner, it is also clear that the petitioner filed CWP no. 56 of 2016 before the Hon'ble High Court of HP wherein the Hon'ble High Court directed the Labour Commissioner to consider the case of the petitioners in terms of the judgment delivered in CWP no. 9467 of 2014 and thereafter the present reference has been received by this Court for adjudication as such the petitioner cannot be blamed for delay. Moreover, it is not the case of the respondents that due to the delay in raising the industrial dispute, there is any loss or unavailability of material evidence. Hence, it cannot be said that delay in raising the industrial dispute is fatal to the reference and as such the petitioner cannot be debarred from claiming the relief from his employer and mere delay in challenging the termination would not be a bar to the adjudication of the present dispute which has been referred to this Court by the appropriate government.

15. The learned ADA for the respondent next contended that the petitioner had left the job at his own after July, 2000. However, there is no iota of evidence on record which could go to show that the petitioner had left the job on his own as no notice or letter regarding abandonment of the job by the petitioner is placed on record by the respondent. Even RW-1 Shri Ravi Bhatti, Assistant Engineer, has admitted in cross-examination that no notice was issued to the petitioner to resume the duties. Therefore, in the absence of any evidence on record, inference cannot be drawn that the petitioner had abandoned the job. Reliance is placed on decision reported in **AIR 1979 SC 582 case titled as G.T Lad and others Vs. Chemicals and Fibers India Ltd.** where it has been held that:

"From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. v. Venkatiah (1964) 4 SC R 265: (AIR 1964 SC 1272), it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."

Hence, in view of the law laid down (supra), and also in view of the evidence led by the parties, it cannot be said that the petitioner had left the job at his own.

16. From the closer scrutiny of the record, it has become clear that initially the petitioner was engaged as beldar on daily wages basis by the respondents in the month of September, 1997 and worked as such till July, 2000. Admittedly, as per mandays chart Ex. RW-1/B, the petitioner had worked for 76 days in the year, 1997, 360 days in 1998, 356 days in 1999 and 211 days in the year, 2000 (till July, 2000). From the mandays chart Ex. RW-1/B, it is also clear that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is also an admitted fact that neither any notice had been issued to the petitioner nor he was paid compensation. Therefore, before terminating the services of the petitioner, it was incumbent upon the respondents to have complied with the provisions of section 25-F of the Act which lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the employer to comply with those conditions as per clauses (a) to (c) which are mandatory in nature. However, in the present case, the perusal of the record shows that the respondents have failed to comply with the provisions of section 25-F of the Act. **In (2015) 4 SCC 544, Mackinnon Mackenzie and Company Ltd., Vs. Mackinnon employees Union**, the Hon'ble Apex Court has held as under:

"34. ……**The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F clauses (a) and (c) of the I.D. Act which are mandatory in law."**

17. In the present case also as observed aforesaid, the respondents have failed to comply with the provisions of section 25-F of the Act before terminating his services. Hence, In view of the law laid down by the Hon'ble Supreme Court (supra) and my foregoing observations, I have no hesitation in holding that the termination/disengagement of the services of the petitioner during July, 2000 by the respondents without complying with the provisions of section 25-F of the Act, is illegal and unjustified.

18. The learned counsel of the petitioner next contended that at the time of the termination of the petitioner, the respondents had retained his juniors who are still working as such the respondents had violated the principles of "last come first go". It has been admitted by RW-1 Shri Ravi Bhatti, Assistant Engineer, in his cross-examination that the workers who have been engaged along-with the petitioner and who were juniors to the petitioner have been regularized. Thus, from the evidence, on record, it has been established that after the disengagement of the services of the petitioner, junior persons have been retained by the respondents without giving an opportunity to the petitioner for re-employment, which is clear cut violation of section 25-G of the Act.

19. Thus, having regard to entire evidence on record and in view of above cited rulings and my foregoing observations, I have no hesitation in holding that the termination of the services of the petitioner during July, 2000, by the respondents without complying with the provisions of the Act, is illegal and unjustified. Accordingly, both these issues are decided in favour of the petitioner and against the respondents.

Issue no. 2.

20. Since I have held under issues no.1 & 2 above that the termination of services of the petitioner by the respondents without following the provisions of the Act is illegal and unjustified. Now, it has to be seen as to what service benefits the petitioner is entitled. Admittedly, the present dispute has been raised by the petitioner after a gap of about 15 years, hence, keeping in view all the facts and circumstances of the case, the petitioner is held entitled to reinstatement in service with seniority and continuity with effect from the date when he raised the demand notice.

21. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

22. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……..."

23. In the present case, the petitioner has failed to discharge his burden by placing any concrete material on record that he was not gainfully employed after his termination/ disengagement. Moreover, the petitioner had raised the present dispute after a gap of about 15 years, hence, the back-wages cannot be granted to him after such a long gap of 15 years. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in

holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondents.

Issue No. 3.

25. In support of this issue, no evidence has been led by the respondents. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication and I find nothing wrong with this petition which is perfectly maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondents.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity with effect from the date when he raised the demand notice. However the petitioner is not entitled to back wages as such the reference is ordered to be answered in favour of the petitioner and against the respondents. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 22nd Day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal-cum-*Labour Court, Shimla.*

11.03.2017 Present : SH. J.C. Bhardwaj. AR for the petitioner union.

Ms. Kiran Negi, Ld. vice Csl. with Sh. Dhananjaya. B.H., Factory

Manager, M/S Wildcraft India (P) Ltd. for respondent.

With the efforts of LokAdalat, the matter has been settled between the parties. It has been stated by Shri J.C. Bhardwaj AR for the petitioner,,s union and Sh. Dhananjaya. B.H., Factor Manager, M/S Wildcraft India (P) Ltd. that the matter has been settled between the parties and all the demands have been accepted by the respondent management, which has been raised in the demand notice dated 24.07.2012 vide settlement dated 12.10.2016, the copy of which is Ex. CA.

Therefore, the reference is disposed of in view of the settlement Ex. CA entered into between the parties, which shall form a part of this award/order. Let a copy of this award/order be sent to appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced:
11.03.2017

(Dr. Sushma Kaushal)
Member.

(Dr. M.L. Kaushal)
Member.

(Sushil Kukreja),
Chairman,
LokAdalat.

27.03.2017

Present : Petitioner with Sh. J.C. Bhardwaj, AR.

Sh. Chander Mohan, Assistant Manager (Personal) for respondent with Sh. Rahul Mahajan, Advocate

At this stage vide separate statement recorded today the petitioner has Stated that she had entered into an out of court settlement with the respondent and received a sum of Rs.1,35,000/- vide cheque No-45889, dated 25.03.2017 drawn on State Bank of Patiala, Dharampur Branch in lieu of her full and final settlement of claim vide reference number 35 of 2010. She further stated that she will not claim any right of re-instatement and other service benefits including gratuity from the respondent in future and the reference petition may be decided accordingly. Vide separate statement recorded today Assistant Manager (Personal) of the respondent has stated that the respondent has paid to the petitioner a sum of Rs.1,35,000/- vide cheque No-45889, dated 25.03.2017 drawn on State Bank of Patiala, Dharampur Branch towards full and final settlement of her claim vide reference number 35 of 2010.

Therefore, in view of the aforesaid statements of the parties, the reference is disposed of. The statements of parties shall form a part of the award/order. Let a copy of this award/order be sent for publication in the official gazette. File, after completion, be consigned to records.

Presiding Judge,
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

App. No. 15 of 2015.

Instituted on 26.5.2015.

Decided on 27.3.2017.

Subhash Chand S/o Shri Geeta Ram R/o Village Mohar, P.O Narag, Tehsil Pachhasd, District Sirmour, HP. ...*Petitioner.*

VS.

Manager Chimak Health Care Padmalaya Bye Pass Road, Kather, Solan, HP. ...*Respondent.*

Claim petition on behalf of the petitioner.

For petitioner : Shri Niranjan Verma, Advocate.

For respondent : Shri C.S Thakur, Advocate.

AWARD/ORDER

Briefly, the case of the petitioner is that he was appointed as office assistant on 9.5.2006 on a monthly salary of ₹ 8000/- and he had been working with the respondent management with full devotion and honesty and on 25.3.2014, he was suspended on false and frivolous allegations. It is further stated that to prove the allegations, enquiry was initiated against the petitioner but the

enquiry officer had not completed the enquiry and no opportunity of being heard was afforded to petitioner as vide letter dated 17.7.2014, the enquiry officer leveled an allegation against the petitioner that on 16.7.2014, he had not appeared before the enquiry officer but on 16.7.2014, the petitioner was present in the reception of the respondent management and remained there till evening and at about 3:15, the petitioner met with the enquiry officer in the reception but he did not call him (petitioner) for joining the enquiry and the persons from the management had stopped him in the reception room and did not allow him to entre inside the premises to join the enquiry. Thereafter, the petitioner wrote a letter dated 16.7.2014 which was sent through registered post to the enquiry officer on 17.7.2014 and a letter from the enquiry officer dated 17.7.2014 was received by the petitioner by post on 5.8.2014 in which the enquiry officer had fixed the date of hearing on 31.7.2014 but the date had already expired when the petitioner got the letter, hence, the petitioner submitted a letter dated 12.8.2014 to the enquiry officer which was posted on 13.8.2014 requesting therein that he be given another date to join the enquiry proceedings but the petitioner was shocked when on 22.8.2014, he received a letter by post vide which his services had been terminated and a cheque qua full & final settlement was sent to him and thereafter the petitioner raised the industrial dispute. It is also stated that the petitioner had completed 240 days with the respondent company in a calendar year and neither any proper enquiry was conducted against him nor he was given any notice before terminating his services. The petitioner made several requests to the management of respondent to take him on duty but all in vain. The respondent had violated the provisions of section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as Act). The petitioner was the President of workers union and he was espousing the cause of the workers and raising the lawful demands of the workers and the respondent management got annoyed from the lawful trade union activities of the petitioner and terminated his services. Against this back-drop a prayer has been made that the respondent be directed to reinstate the petitioner along-with all consequential benefits.

2. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken qua maintainability, that the petitioner has not come to this Court with clean hands and estoppel. On merits, it has been denied that the petitioner was appointed as office assistant on 9.5.2006 and he was getting monthly salary of ₹ 8000/-. It has been asserted that the petitioner was appointed as unskilled labourer/helper by the respondent company at a monthly salary of ₹ 2100/-. The petitioner had been indulging in gross misconduct and mis-behavior with the management, staff and co-workers. The petitioner had started avoiding assigned work and on his explanation he started bullying and misbehaving with the management and for his misconduct the management had served various show cause notices to him but despite that he had been repeating the same things again instead of mending his behaviour and on asking by the management he directly started giving threatening to face dire consequences even to the managing partner of the company and when the misconduct and negligence of the petitioner had crossed all the limits then he had been chargesheeted vide letter dated 10.4.2014. The reply of the petitioner was not found satisfactory, then an enquiry officer was appointed to initiate fair and proper enquiry on the charges framed vide chargesheet dated 10.4.2014. The enquiry officer initiated the enquiry in detail and submitted his report dated 6.8.2014 whereby the charges leveled against the petitioner had been duly proved and after receiving the enquiry report, the management had decided to terminate the services of the petitioner vide letter dated 22.8.2014 by settling the full & final dues. It is denied that on 25.3.2014, the petitioner was suspended on false and frivolous allegations and that on 16.7.2014, he was present in the reception of the company and remained there till evening. It is further denied that the enquiry officer had not afforded the opportunity of being heard to the petitioner and that the petitioner had completed 240 days in a calendar year. The respondent prayed or the dismissal of the claim petition.

3. Rejoinder not filed. On the pleadings of the parties, the following issues were framed on 27.2.2016.

1. Whether the termination of the services of the petitioner w.e.f. 22.8.2014 by the respondent without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what service benefits the petitioner is entitled to? ...*OPP.*

3. Whether the petition is not maintainable as alleged? ...*OPR.*

4. Whether the petitioner is estopped to file the present petition due to his acts, deed and conduct? ...*OPR.*

5. Whether the petitioner has concealed the material facts from this Court as alleged? ...*OPR.*

6. Relief.

4. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

5. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1 Yes.

Issue no.2 Entitled to lump sum compensation.

Issue no.3 No.

Issue no.4 No.

Issue no.5 No.

Relief. Petition allowed per operative part of award/order.

REASONS FOR FINDINGS.

ISSUE NO. 1.

6. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondent illegally without serving him any notice as required under section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that before terminating the services of the petitioner neither any proper enquiry had been conducted nor he was afforded any opportunity to defend himself.

7. On the other hand, Ld. counsel for the respondent contended that the services of the petitioner had been terminated by conducting proper and fair domestic enquiry and proper opportunity of being heard was afforded to him in accordance with the principles of natural justice.

8. To prove issue no.1, the petitioner appeared into the witness box as PW-1 to depose that on 9.5.2006, he was appointed as office assistant and worked till 25.3.2014 on monthly salary of ₹8000/-. He was suspended on false and frivolous allegations on 25.3.2014 vide suspension

letter Ex. PW-1/A. He further stated that an enquiry was conducted against him and Shri Vivek Kalia was appointed as an enquiry officer and he was called on 5.7.2014 to participate in the enquiry and the next date was fixed on 16.7.2014 on which date he was present to attend the enquiry in the reception room and waited till 5:00 PM and at about 3:15 PM, the enquiry officer entered in the reception and went to the office and he was not allowed to participate in the enquiry. He also stated that he wrote a letter Ex. PW-1/D to the enquiry officer and sent the same through registered post on 17.7.2014 vide postal receipt Ex. PW-1/E and thereafter a letter dated 17.7.2014 Ex. PW-1/F was received by him on 5.8.2014 upon which he wrote letter Ex. PW-1/G vide postal receipt Ex. PW-1/H, to the enquiry officer requesting therein to change the date of proceedings. Thereafter he was never associated in the enquiry and no opportunity was given to him to lead the defence evidence and a termination letter dated 22.8.2014 Ex. PW-1/J was issued to him alongwith detail of full & final settlement. Since, he was the president of the workers union and he used to raise the grievance of the workers, therefore, the management had terminated his services. In cross-examination, he admitted that he had been appointed as unskilled worker. He denied that he had not been doing the work which was assigned to him and have been sitting idle throughout the day and that he had been issued several oral warnings by the management to mend his behaviour. He also denied that on 24.3.2014, at about 4:20PM, he misbehaved with the managing partner of the company. He admitted that he had been issued show cause notice Ex. PW-1/A which was replied by him vide Ex. PW-1/C. He further admitted that he used to get suspension allowances during the period of his suspension. He also admitted that a chargesheet was issued against him and that the management had informed him about the appointment of enquiry officer. He admitted that enquiry proceedings commenced on 16.6.2014 and he appeared before the enquiry officer and also filed reply. He denied that the enquiry officer had told him about the facts of the case. He admitted that the next date of enquiry was fixed on 16.7.2014 at 3:00 PM but denied that he had appeared in the morning and thereafter left. He denied that he had not appeared before the enquiry officer. He admitted that a letter regarding the intimation of the next date was issued by the enquiry officer on 17.7.2014. He denied that he had received the letter in time and had not appeared before the enquiry officer intentionally. He admitted that he had received a cheque amounting to ₹45730/- in lieu of the benefits at the time of termination. He denied that he used to threaten the management to go on illegal strike thereby causing obstructions in the working of the factory.

9. The respondent has examined three RWs. RW-1 Shri Birendra Chalaune, Manager of respondent company had appeared in the witness box as RW-1 to depose that the petitioner was working as unskilled worker and was drawing salary of ₹2100/- per month and thereafter he had been paid regular increments and other benefits till his termination. He further deposed that the behavior of the petitioner was not proper from the beginning and he used to say that he would work at his own pleasure as he was the leader of the trade union and even he did not obey the orders of the superiors and not used to complete the work assigned to him. He also stated that the petitioner misbehaved with the owner of the company and thereafter on 10.4.2014, a chargesheet was issued to him and enquiry was conducted against him and Shri Vivek Kalia was appointed as enquiry officer. The petitioner had left the enquiry proceedings in the middle and did not participate. The enquiry was conducted in fair and proper manner and since the petitioner was found guilty of misconduct, his services have been terminated. In cross-examination, he admitted that identity card Ex. PW-1/B was issued by the respondent and that the designation and his salary have been mentioned in Ex. PW-1/B. He admitted that on 16.7.2014, the enquiry officer had come at about 3:15 PM and went to the office of the manager. He denied that the petitioner was not allowed to lead evidence in his defence and that the petitioner never misbehaved with anyone. He further denied that the petitioner was removed from service as he was engaged in legitimate activities of the workers union. He admitted that the petitioner remained the President of the workers union.

10. RW-2 Shri Vivek Kalia, Enquiry Officer has deposed that vide letter Ex. RW-2/A he was appointed as enquiry officer by the respondent company and he conducted the enquiry on the

basis of chargesheet Ex. RW-2/B, issued to the petitioner and during the enquiry proceedings, he served a notice to the petitioner to appear at the place of enquiry and to submit his relevant defence against the chargesheet. On 28.6.2014 and 5.7.2014, the petitioner appeared in person but on 16.7.2014, he had not appeared and thereafter, notice through registered post was issued intimating therein the next date of enquiry on 31.7.2014 but he did not appear and was proceeded against ex-parte. He further deposed that thereafter the respondent company submitted their stand in the form of evidence as statements of Yadav Singh and Harish Singh along-with letter of managing partner on 4.8.2014 and after going through the relevant record and documents, he held the petitioner guilty of misconduct and accordingly submitted his enquiry report Ex. RW-2/C. In cross-examination, he denied that on 16.7.2014 he did not call the petitioner to participate in the enquiry. He admitted that letter Ex. PW-1/G was received by him and he had not given any further date to the petitioner. He denied that he had conducted the enquiry in connivance with the management and that the petitioner was not afforded reasonable opportunity of being heard. He also denied that he had not conducted a proper and fair enquiry.

11. RW-3 Shri Yadav Singh, Commercial Manager has stated that the petitioner was working as a designer with the respondent under his supervision and his behaviour was not proper with the staff and with the superiors as when the petitioner was working in the store, he had quarreled with the store incharge. He further deposed that he had made a complaint to the owner of the company but the petitioner also misbehaved with the owner and abused him. In cross-examination, he denied that he was not posted as Commercial Manager with the respondent company. He further denied that the petitioner had never misbehaved with anyone in the respondent company and that the services of the petitioner were illegally terminated as he used to raise lawful demands of the workers.

12. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that the petitioner was in service of the company since the year, 2006 and he was issued a chargesheet dated 10.4.2014. Since the reply to chargesheet submitted by the petitioner was not found satisfactory, a domestic enquiry was ordered to be conducted against him and Shri Vivek Kalia, Advocate was appointed as an enquiry officer to enquire into the charges leveled against him in respect of the chargesheet. After conclusion of the enquiry, the enquiry officer submitted his report Ex. RW-2/C. On the receipt of the enquiry report from the enquiry officer and after the satisfaction of the respondent that the charges leveled against the petitioner stood proved, the respondent concurred with the findings of the enquiry officer and decided to terminate the services of the petitioner vide letter dated 22.8.2014 and paid him full & final dues through cheque dated 22.8.2014. Feeling aggrieved, the petitioner raised the industrial dispute before the Labour cum Conciliation Officer but the matter could not be settled as such the petitioner filed the present application before this Court for adjudication.

13. Now, the question which arises for consideration is as to whether the domestic enquiry conducted against the petitioner is unfair and violative of principles of natural justice. It is a settled proposition of law that the technicalities of the evidence Act are not applicable in the domestic enquiry but at the same time it is also true that the domestic enquiry is not an empty formality and the principles of natural justice have to be followed. In **State of Haryana Vs. Rattan Singh (1977) 2 SCC 491**, it has been held by the Hon'ble Apex Court as under:

> "In a domestic enquiry all the strict and sophisticated rules of the Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible, though departmental authorities and Administrative Tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Evidence Act. The essence of judicial approach is objectivity, exclusion of extraneous materials or considerations, and observance of rules of natural justice. Fair play is the basis

and if perversity or arbitrariness, bias or surrender of independence of judgment, vitiate the conclusion reached, such a finding, even of a domestic tribunal, cannot be held to be good. The simple point in all these cases is, was there some evidence or was there no evidence-not in the sense of the technical rules governing Court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny by court, while absence of any evidence in support of the finding is an error of law apparent on the record and the court can interfere with the finding".

14. The learned counsel for the petitioner contended that the principles of natural justice have been violated in the instant case as the petitioner was not allowed to participate in the enquiry. While appearing in the witness box as PW-1, the petitioner categorically deposed that he was called on 5.7.2014 to participate in the enquiry and the next date was fixed on 16.7.2014 on which date he was present to attend the enquiry in the reception room of the company and waited till 5:00 PM but he was not allowed to participate in the enquiry. He further deposed that thereafter he wrote a letter to the enquiry officer and sent the same through registered post and thereafter a letter dated 17.7.2014 was received by him on 5.8.2014 upon this he wrote another letter to the enquiry officer Ex. PW-1/G requesting therein to change the date of proceedings. RW-2 the enquiry officer admitted that on 16.7.2014, the petitioner was present at the reception room at about 3:15 PM. He had also admitted that the letter Ex. PW-1/F was posted on 19.7.2014 regarding the intimation that the enquiry proceedings had been fixed on 31.7.2014 at 2:30 PM. He expressed his ignorance that the aforesaid letter was received by the petitioner on 5.8.2014. He also admitted that the letter dated 12.8.2014 Ex. PW-1/G was received by him and after receiving the same he had not given any further date to the petitioner. Therefore, the perusal of the entire evidence shows that on 16.7.2014 the petitioner was present in the reception room of the company but he was not allowed to participate in the enquiry and immediately he wrote a letter Ex. PW-1/D to the enquiry officer. From the evidence on record it is clear that letter Ex. PW-1/F was posted on 19.7.2014. The case of the petitioner is that he had received the aforesaid letter on 5.8.2014 when the date of the enquiry fixed on 31.7.2014 had already expired. No evidence has been led by the respondent to show that the aforesaid letter Ex. PW-1/F was received well before 31.07.2014 by the petitioner. RW-1 expressed his ignorance as to whether he received acknowledgement (AD) of the aforesaid letter which was the best piece of evidence to show the date of the receipt of the letter by the petitioner. However, for the reasons best known to the respondent, the acknowledgement (AD) has not been placed on record. Therefore, in the absence of any evidence on record, it cannot be said that the petitioner had received the letter Ex. PW-1/F well before 31.7.2014. Furthermore, RW-2, enquiry officer has admitted that he received a letter dated 12.8.2014 from the petitioner wherein the petitioner had requested to give him another date to participate in the enquiry as he was not aware about the date of 31.7.2014. However, despite the receipt of the aforesaid letter no further date was given to the petitioner to participate in the enquiry as admitted by RW-2 in cross-examination. Therefore, the aforesaid facts would show that no reasonable opportunity was given to the petitioner to defend himself during the enquiry proceedings as a result of which a great prejudice has been caused to him. In the light of the facts and circumstances of the instant case, it can safely be held that the enquiry conducted against the petitioner is voilative of the principles of natural justice. It is a settled proposition of law that the procedural fairness is the essence of natural justice and procedural violation cannot lightly be brushed aside. Therefore, the denial of opportunity to defend himself to the petitioner is clear cut violation of the principles of natural justice as such I have no hesitation in holding that the domestic enquiry conducted against the petitioner is unfair and vioaltive of the principles of natural justice and as such the enquiry report Ex. RW-1/C is set aside.

15. The respondent could have led the evidence before this Court in order to prove the alleged misconduct against the petitioner. However, except for the oral testimony of RW-1 & RW-

3, no other evidence has been led by the respondent. Though, RW-1 stated that the petitioner was issued warnings regarding his misbehavior. However, no warning letter has been placed on record by the respondent. RW-3 deposed that a police complaint was filed against the petitioner however, no such police complaint has been produced on record. He has also admitted in cross examination that he had not brought the copy of warning memo, show cause notice or any record issued to the petitioner for his misbehavior. Therefore, no credence can be attached to the testimony of RW-1 and RW-3. The owner of the respondent company has also failed to appear in the witness box in order to prove that the petitioner misbehaved with him. Hence, in view of the fact that the enquiry against the petitioner has been set aside and the respondent has failed to prove the alleged misconduct against the petitioner by leading cogent and satisfactory evidence before this Court, therefore, it can safely be held that the termination of the services of the petitioner w.e.f 22.8.2014 is illegal and unjustified. Accordingly, issue no.1 is decided in favour of the petitioner and against the respondent.

ISSUE NO. 2.

16. Since I have held under issue No.1 that the termination of the services of the petitioner was illegal and unjustified, hence the question arises as to what service benefits, the petitioner is entitled. It is by now well settled that if termination of an employee is found to be illegal, the relief by way of reinstatement with back wages is not automatic. The Hon'ble Supreme Court in **Santosh Kumar Seal & others reported in 2010 LLR 677** has held that relief by way of reinstatement with backwages is not automatic even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure and that mandatory compensation in lieu of reinstatement and backwages in cases of such nature may be appropriate.

17. In **Jagbir Singh Versus Haryana State Agricultural Marketing Board (2009) 15 SCC Page 327,** the Hon'ble Supreme Court has held as under;

> **"It is true that earlier view of this court articulated in many decisions reflects the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in the recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice."**

In the present, even though the termination of the petitioner is held to be illegal and unjustified but his reinstatement will not be appropriate relief as it has come on record that the respondent's company is now closed as stated by RW3 in his statement before this Court. Therefore, in such a situation it would not be appropriate to make the order of reinstatement in the instant case. Hence, taking into account all the facts and circumstances of the case, the ends of justice would be met, if lump sum compensation in lieu of reinstatement is awarded to the petitioner. Therefore, in my view, the petitioner is entitled to receive a suitable, appropriate, just and equitable compensation from the respondent and keeping in view the facts and circumstances of the case, it would be quite reasonable and justified if lump sum compensation of ₹ 50,000/- (Rs. Fifty Thousand Only) is awarded to the petitioner instead of reinstatement. Consequently, this issue is decided in favour of the petitioner and against the respondent.

ISSUE No. 3

18. In support of this issue, no evidence has been led by the respondent which could go to show that this petition is not maintainable. Hence, in the absence of any evidence on record, this issue is decided in favour of the petitioner and against the respondent.

ISSUE NO. 4 & 5

19. The onus to prove these issues was on the respondent, however, no evidence has been led by the respondent to show that the petitioner is estopped to file the present petition and the petitioner has concealed the material facts from this Court. Therefore, in the absence of any evidence on record, both these issues are decided in favour of the petitioner and against the respondent.

RELIEF

20. As a sequel to my above discussion and findings on issues No.1 to 5, claim of the petitioner succeeds and is hereby allowed with the result that the respondent is directed to pay a sum of ₹ 50,000/- (Rs. Fifty Thousand only) as lump sum compensation to the petitioner within three months from today failing which the same shall carry an interest @ 9 % per annum from the date of publication of this Order/Award. Let a copy of this Order/Award be sent to the government for publication in the official gazette. File, after due completion be consigned to the records.

Announced in the open court today on this 27th day of March, 2017.

(SUSHIL KUKREJA)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

1.3.2017.

Present: None for the petitioner.

Ms. Reena Chauhan, Dy. DA for respondent.

This case is being listed for the service of the petitioner w.e.f. 3.9.2016 and thereafter as many as five times the notices were issued/sent for the service of the petitioner on the address given by the office of Labour Commissioner on reference itself. However, despite that the petitioner has failed to appear before this Court. It is relevant to mention here that the Labour Commissioner has also informed the petitioner about the present reference by sending a copy of this reference to him as such the petitioner is having knowledge that the reference has been sent to this Court by the Labour Commissioner for adjudication. Thus, he could have himself appeared before this Court in order to file his claim. In the light of aforesaid facts, it appears that the petitioner is not interested to pursue his claim. Therefore, to further adjourn the case would be a futile exercise. The following reference qua the termination of services of petitioner was received from appropriate government for adjudication:

"Whether alleged termination of services of Shri Narender Singh S/o Late Shri Mandass R/o Village Jajehar, P.O Gumma, Tehsil & District Shimla, HP during June, 1988 by the Executive Engineer, I&PH Division No.II District Shimla, HP who had worked as beldar on daily wages only for 21 days in the year, 1988 and has raised his industrial dispute more than 24 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? IF not, keeping view of working period of 21 days in the years, 1988 and delay of more than 24 years in raising the industrial dispute what amount of back wages, seniority, past service

benefits and compensation the above ex-worker is entitled to from the above employer?"

From the reference, it is clear that the petitioner has alleged his termination during June, 1988 to be illegal and unjustified. However, for the failure of the petitioner to have appeared before this Court in order to file statement of claim and to lead evidence, it cannot be held that his services were wrongly and illegally terminated by the respondent. Moreover, from the reference it is also clear that the petitioner had worked only for 21 days in the year, 1988 and raised his dispute after a lapse of more than 24 years which shows that he is not serious about the dispute raised by him. Hence, in the absence of any material on record, the reference is answered against the petitioner and the award is passed accordingly. However, the petitioner is at liberty to revive this reference by moving an appropriate application. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced:
1.3.2017.

(SUSHIL KUKREJA),
Presiding Judge,
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Ref no. 89 of 2013.

Instituted on 14.11.2013.

Decided on 6.3.2017.

Akhtar Ali S/o Shri Sain Mohd. R/o Village Majra, Tehsil Paonta Sahib, District Sirmour, HP. *...Petitioner.*

VS.

Himalya International Ltd. (Government Recognized Export House) Head Office, Subhkhera Paonta Sahib, District Sirmour, HP through its Manager-Human-Resources.
...Respondent.

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri Pawnish Kumar, Advocate.

For respondent : Shri Hardeep Verma, Advocate.

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"***Whether termination of the services of Shri Akhtar Ali S/o Shri Sain Mohd. R/o Village Majra, Paonta Sahib, District Sirmour, HP w.e.f. 30.4.2012 by the Masnaging Director/ Employer M/s Himalya International Ltd., Shubhkhera, Paonta Sahib District Sirmour, HP (present office) M/s Himalya International Ltd., E-555, 1st and 2nd Floor Palam Extension Sector-7 Dwarka, New Dehli, 110077 (Regd. Office) without complying with***

the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"

2. Facts, in brief are that initially the petitioner was engaged as supervisor in the department of mushroom house on the basis of probation for six months in the year, 2002 and thereafter his services were regularized. The petitioner had worked with the respondent with utmost honesty, sincerely and to the entire satisfaction of his superiors and no complaint whatsoever had been made with regard to the performance of his official duties. The petitioner is a workman as defined under section 2 (s) of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) and the respondent company is an industry within the ambit of Act. The petitioner had completed 240 days in each calendar year preceding his termination and even before terminating his services neither any notice nor any compensation had been given to him. It is further stated that keeping in view the yearly performance, in the month of Jan., 2012, the respondent had given increment to the petitioner and on 1.1.2012, the respondent had also increased his consolidated salary of ₹ 96000/- per annum. It is further stated that in the year 2012, when petitioner was discharging his duties as per the directions of his senior official, he had received two show cause notices dated 12.3.2012 and 13.4.2014 and that the petitioner had been served 2nd show cause notice dated 13.4.2012 by mentioning that on 12.4.2014, he had stolen 150 KG mushroom from the mushroom section and he was caught red handed and the company had suffered loss of ₹ 2,50,000/- and the petitioner was directed to submit ₹ 2,50,000/- to the company and he was called to show cause within two days. That the petitioner had submitted his reply dated 19.4.2012 but without considering his reply, penalty of dismissal/termination was imposed upon him w.e.f. 30.4.2012. The respondent had not followed the basic principles, rules of departmental enquiry proceedings which are necessary as per law. The services of the petitioner had been terminated illegally without complying with the mandatory provisions of the Act. The petitioner had completed 240 days in 12 calendar months and even preceding the date of his illegal termination. The respondent while terminating the services of the petitioner grossly violated the settled principles of law. Against this back-drop a prayer has been made that the respondent be directed to re-instate the petitioner in service with retrospective effect along-with all consequential benefits including back-wages.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken qua maintainability, concealment of material facts, estoppel and that the petitioner is guilty of theft which is grave and gross mis conduct. On merits, it has been admitted that initially the petitioner was appointed as worker and since 2007, he was working as supervisor, hence, he is no more a workman as defined under section 2 (s) of the Act. It is denied that no notice was given to the petitioner prior to his termination. It is asserted that the petitioner was caught red handed stealing 150 KG of mushroom along-with two other accomplices, resultantly, a show cause notice/chargesheet was served on him and he was asked to submit reply within two days and he submitted his reply on 19.4.2012 which was found unsatisfactory and a departmental enquiry was initiated by appointing an enquiry officer. The petitioner not only pleaded guilty in writing but also revealed that he had been indulging in these acts of theft for quite some time along-with two other accomplices, hence, the charges were proved beyond doubt. The enquiry committee after considering the gravity and seriousness of the misconduct, had no other option but to terminate the services of the petitioner. It is denied that the petitioner was discharging his duties with utmost honesty and to the entire satisfaction of his superiors. It is further asserted that the respondent company initiated the enquiry as per the procedure laid down in Standing orders and the termination of the petitioner in no way violates any provisions of the Act. The respondent prayed or the dismissal of the claim petition.

4. Rejoinder not filed. On the pleadings of the parties, the following issues were framed on 22.3.2016.

1. Whether the termination of the services of the petitioner w.e.f. 30.4.2012 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what service benefits the petitioner is entitled? ...*OPP.*

3. Whether the petition is not maintainable as alleged? ...*OPR.*

4. Whether the petitioner is estopped to file the present petition on account of his own acts, deeds and conduct as alleged? ...*OPR.*

5. Relief.

5. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1 No.

Issue no.2 Becomes redundant.

Issue no.3 No.

Issue no.4 Not pressed.

Relief. Reference answered against the petitioner per operative part of award.

Reasons for findings

Issue no. 1

7. To prove issue no.1, the petitioner has stepped into the witness box as PW-1 to depose that he joined the respondent company in the year, 2002 initially as worker for a period of six months on the basis of probation and thereafter his services were made permanent and in the year 2007, he had been promoted as supervisor and in the year, 2012 he had been given increment vide Ex. PW-1/A, keeping in view of his past performance. Show cause notice Ex. PW-1/B had been received by him in which allegation regarding theft of 150 Kg of mushroom had been leveled and he was asked to submit his reply within two days and vide mark PX-1, he filed detailed reply and thereafter he appeared before the enquiry officer till 30.4.2012 but the respondent company forced him to sign some blank papers and thereafter on 30.4.2012, he received an enquiry report vide which his services have been terminated and thereafter he raised demand notice. He also received summon from the Court of Civil Judge, Paonta Sahib wherein he found that the company had filed a recovery suit of ₹ 20,000/- against him. His services were illegally terminated and he be reinstated along-with all consequential benefits. In crossexamination, he admitted that in the year, 2007, he was promoted as supervisor. He denied that he was caught red handed while stealing 150 Kg mushroom. He admitted that a show cause notice was served upon him. He denied that he had made any confessional statement along-with reply to show cause notice. He further denied that on the basis of confessional statement the enquiry officer found him guilty for gross-misconduct and the management terminated his services.

8. The respondent has examined one Shri B.K Sharma as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as stated in the reply. He also tendered in evidence show cause notice dated 13.4.2012 Ex. RW-1/B, reply to show cause notice Ex. RW-1/C, confessional statement of the petitioner Ex. RW-1/D, enquiry report Ex. RW-1/E and copy of suit for recovery Ex. RW-1/F. In cross-examination, he admitted that Ex. RW-1/B has been issued by the respondent company and that the company suffered a loss of ₹ 2,50,000/-. He further admitted that in the show cause notice Ex. RW-1/B allegations of theft have been leveled against the petitioner and that no FIR had been lodged against him. He denied that the allegations leveled in show cause notice Ex. Rw-1/B, are false and baseless. He admitted that the suit for recovery of ₹ 20,000/- with respect to the theft of mushroom has been filed against the petitioner. He denied that the petitioner had been illegally terminated.

9. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that the petitioner was initially appointed as worker and thereafter he was promoted as supervisor. It is also admitted case of the petitioner that a show cause notice/ chargesheet dated 13.4.2012 Ex. RW-1/B was issued to him alleging therein that he was caught red handed stealing 150 Kg of mushroom. It is also not disputed that the petitioner filed reply to the aforesaid show cause notice/chargesheet, the copy of which is Ex. RW-1/C which was found unsatisfactory by the management and consequently a domestic enquiry was initiated against the petitioner. The learned counsel for the petitioner contended that a fair and proper enquiry was not held and the enquiry was in violation of the principles of natural justice. In **K.L Tripathi *Vs.* State Bank of India and ors. AIR 1984 SC 273** while dealing with the concept of natural justice in the back-drop of departmental proceedings, it has been held as under:

> "It is true that all actions against a party which involve penal or adverse consequences must be in accordance with the principles of natural justice but whether any particular principle of natural justice would be applicable to a particular situation or the question whether there has been any infraction of the application of that principle, has to be judged, in the light of facts and circumstances of each particular case. The basic requirement is that there must be fair play in action and the decision must be arrived at in a just and objective manner with regard to the relevance of the materials and reasons. We must reiterate again that the rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity of cross-examination, it has to be established that prejudice has been caused to the appellant by the procedure followed."

In Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and Others, (1991) 2 SCC 716, the Hon'ble Apex Court laid down that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. The relevant para of the aforesaid judgment is reproduced as under :

"37. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation, etc. seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof, but inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish.……The standard of proof is not proof beyond reasonable doubt but the preponderance of probabilities tending to draw an inference that the fact must be more probable.

10. The aforesaid decision was relied upon by the **Hon'ble Supreme Court in AIR 2005 S.C 570 titled as Cholan Roadways Ltd. Vs. G Thirugnanasambandam**, wherein it has been observed as under:

> "17. There cannot, however, be any doubt whatsoever that the principle of natural justice are required to be complied with in a domestic enquiry. It is, however, well-known that the said principle cannot be stretched too far nor can be applied in a vacuum."
>
> "18. ……..."
>
> 19. It is further trite that the standard of proof required in a domestic enquiry vis-à-vis a criminal trial is absolutely different. Whereas in the former 'preponderance of probability' would suffice; in the latter, 'proof beyond all reasonable doubt' is imperative."

11. From the aforesaid decisions of the Hon"ble Supreme Court, it has become quite clear that in a domestic enquiry, the principles of natural justice are to be observed on certain parameters and the enquiry is to be fairly and properly conducted. That apart, the proof in a domestic enquiry stands on a different platform that is required in a court of law. Now, in the light of the aforesaid decisions of the Hon"ble Supreme Court, it has to be seen in the present case as to whether there was any violation of principles of natural justice in the enquiry held against the petitioner. While appearing in the witness box before this Court as PW-1, the petitioner has not uttered even a single word to substantiate his allegations that the enquiry was not conducted in a fair and proper manner and there had been violation of principles of natural justice. On the other hand Shri B.K Sharma, Senior Manager of the respondent company tendered in evidence his affidavit Ex. RW-1/A wherein he categorically deposed that an enquiry officer/committee was appointed in to the charges regarding the misconduct committed by the petitioner and proper procedure as specified under Rule 19(5), (3) and (35) of the Standing Orders as amended up to date and applicable to the petitioner was followed. The petitioner not only pleaded guilty in writing but also revealed that he has been indulging in these acts of theft for quite some time alongwith two other accomplices namely Pawan Kumar and Alok Sharma. He has also placed on record the confessional statement of the petitioner Ex/ RW-1/D wherein the petitioner has admitted that he was caught red handed by the management stealing the mushroom along-with Pawan Kumar and Alok Sharma and he also mentioned in the confessional statement that they had been indulging in the aforesaid acts of theft and had been selling the mushroom in the market. After considering the gravity and seriousness of the misconduct and on the basis of the confessional statement of the petitioner Ex. RW-1/D, the enquiry committee had found him guilty as per the enquiry report Ex. RW-1/E. The perusal of the enquiry report shows that chargesheet was served upon the petitioner for the misconduct during duty hours and his explanation was called for and since his explanation was found unsatisfactory, an enquiry was conducted against him and he was afforded full opportunity before the enquiry committee and when the charges were put to him, the petitioner confessed his guilt in writing. No suggestion has been given to RW-1 by the learned counsel for the petitioner that the confessional statement was not given by the petitioner. In the absence of any satisfactory evidence on record, it cannot be said that the enquiry was not conducted in a fair and proper manner. From the scrutiny of the enquiry report as well as entire evidence on record, there can be no iota of doubt that the petitioner was afforded proper opportunity to defend himself and there had been no violation of principles of natural justice. The charges leveled against the petitioner stood duly proved as per the enquiry report Ex. RW-1/E.

12. Now, the question which arises for consideration before this Court is as to whether the punishment imposed by the respondent is disproportionate to the gravity of misconduct. I**n (2005) 3 S.C.C 134, Mahindra and Mahindra Ltd.** ***Vs.*** N.B Narawade, it has been held by the Hon"ble

Supreme Court that after introduction of section 11–A in the Industrial Disputes Act certain amount of discretion is vested with the Labour Court/ Tribunal in interfering with the quantum of punishment whereby the concerned workman is found guilty of the misconduct. The relevant portion of the aforesaid judgment is reproduced as under:

> "20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the workman concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to hereinabove and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment."

In the present case as observed earlier, the charges leveled against the petitioner vide chargesheet dated 13.4.2012 Ex. RW-1/B shows that the petitioner had committed theft of 150 KG of mushroom from the mushroom section of respondent company and had been caught red handed and the aforesaid charges stood duly proved against the petitioner. Such an act on the part of the petitioner causing financial loss to the employer amounts to serious misconduct and the punishment of dismissal imposed upon the petitioner cannot be said to be shockingly disproportionate to the charges proved against him and the same does not call any interference by this Court under section 11-A of the Act. Moreover, it has further been laid down by the Hon'ble Supreme Court in **Divisional Controller, NEKRTC *v.* H. Amaresh, (2006) 6 SCC 187,** that in such type of cases the loss of confidence is the primary factor and not the amount of money misappropriated and the sympathy or generosity cannot be a factor which is impermissible in law. The relevant portion of the aforesaid judgment is reproduced as under:

> "In the instant case, the misappropriation of the funds by the delinquent employee was only Rs.360.95. This Court has considered the punishment that may be awarded to the delinquent employees who misappropriated the funds of the Corporation and the facts to be considered. This Court in a catena of judgments held that the loss of confidence is the primary factor and not the amount of money misappropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an employee is found guilty of pilferage or of misappropriating the Corporation's funds, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment." In the case in hand, the petitioner had committed theft and was caught red handed and in his confessional statement he had admitted that he had been indulging in aforesaid acts of theft and had been selling the mushroom in the market Since, it was a dishonest act, as a result of which the respondent company sustained financial loss as such the respondent is bound to lose faith in such an employee as such a lesser punishment cannot be imposed upon the petitioner in the exercise of discretion under section 11-A of the Act. In other words, the order passed by the respondent terminating the services of the petitioner does not call for any interference by this Court.

13. Therefore, in view of my aforesaid discussion, I have no hesitation in holding that the termination of the services of the petitioner w.e.f. 30.4.2012 is legal and justified. Accordingly, issue no.1 is decided in favour of the respondent and against the petitioner.

Issue No. 2

14. Since, the petitioner has failed to prove issue no.1, this issue becomes redundant.

Issue no. 3.

15. In support of this issue, no evidence has been led by the respondent which could go to show as to why the petition is not maintainable. Moreover, the petitioner has filed the present claim pursuant to the reference sent by the appropriate government to this Court for adjudication. Therefore, I find nothing wrong with this claim petition which is perfectly maintainable in the present form.

Issue no. 4.

16. During the course of arguments, the learned counsel for the respondent did not press this issue, hence, the same is decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioner. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 6th day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Ref no. 1 of 2014.

Instituted on 1.1.2014.

Decided on 6.3.2017.

Pawan Kumar S/o Shri Nikka Ram R/o Kedarpur, Tehsil and Post Office Paonta Sahib, District Sirmour, HP. ...*Petitioner.*

VS.

Himalya International Ltd. (Government Recognized Export House) Head Office, Subhkhera Paonta Sahib, District Sirmour, HP through its Manager-Human-Resources.

...Respondent.

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri Pawnish Kumar, Advocate.

For respondent : Shri Hardeep Verma, Advocate.

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"***Whether termination of the services of Shri Pawan Kumar S/o Shri Nikka Ram R/o Village Kedarpur Tehsil and P.O Paonta Sahib, District Sirmour, HP w.e.f. 30.4.2012 by the Masnaging Director/Employer M/s Himalya International Ltd., Shubhkhera, Paonta Sahib District Sirmour, HP (present office) M/s Himalya International Ltd., E- 555, 1st and 2nd Floor Palam Extenstion Sector-7 Dwarka, New Dehli, 110077 (Regd. Office) without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"***

2. Facts, in brief are that initially the petitioner was engaged as supervisor in the department of mushroom house on the basis of probation for six months on 19.8.2009 and thereafter his services were regularized. The petitioner had worked with the respondent with utmost honesty, sincerely and to the entire satisfaction of his superiors and no complaint whatsoever had been made with regard to the performance of his official duties. The petitioner is a workman as defined under section 2 (s) of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) and the respondent company is an industry within the ambit of Act. The petitioner had completed 240 days in each calendar year preceding his termination and even before terminating his services neither any notice nor any compensation had been given to him. It is further stated that keeping in view the yearly performance, in the month of August, 2010, the respondent had given increment of ₹ 1000/- to the petitioner w.e.f. 1.7.2010 and on 1.1.2012, the respondent had also increased his consolidated salary ₹ 96000/- per annum. It is further stated that in the year 2012, when petitioner was discharging his duties as per the directions of his senior official, he had received two show cause notices dated 12.3.2012 and 13.4.2014 and that the petitioner had been served 2nd show cause notice dated 13.4.2012 by mentioning that on 12.4.2014, he had stolen 100 KG mushroom from the mushroom section and he was caught red handed and the company had suffered loss of ₹ 1,90,000/- and the petitioner was directed to submit ₹ 1,90,000/- to the company and he was called to show cause within two days. That the petitioner had submitted his reply dated 19.4.2012 but without considering his reply, penalty of dismissal/termination was imposed upon him w.e.f. 30.4.2012. The respondent had not followed the basic principles, rules of departmental enquiry proceedings which are necessary as per law. The services of the petitioner had been terminated illegally without complying with the mandatory provisions of the Act. The petitioner had completed 240 days in 12 calendar months and even preceding the date of his illegal termination. The respondent while terminating the services of the petitioner grossly violated the settled principles of law. Against this back-drop a prayer has been made that the respondent be directed to re-instate the petitioner in service with retrospective effect along-with all consequential benefits including back-wages.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken qua maintainability, concealment of material facts, estoppel and that the petitioner is guilty of theft which is grave and gross mis conduct. On merits, it has been admitted that initially the petitioner was appointed as supervisor for six months and since 19.8.2009, his services were regularized and since he was working as supervisor, hence, he is no more a workman as defined under section 2 (s) of the Act. It is denied that no notice was given to the petitioner prior to his termination. It is asserted that the petitioner was caught red handed stealing 150 KG of mushroom along-with two other accomplices, resultantly, a show cause notice/chargesheet was served on him and he was asked to submit reply within two days and he submitted his reply on 19.4.2012 which was found unsatisfactory and a departmental enquiry was initiated by appointing an enquiry officer. The petitioner not only pleaded guilty in writing but also revealed that he had been indulging in these acts of theft for quite some time along-with two other accomplices, hence, the charges were proved beyond doubt. The enquiry committee after considering the gravity and seriousness of the misconduct, had no other option but to terminate the services of the petitioner. It is denied that the petitioner was discharging his duties with utmost honesty and to the entire satisfaction of his superiors. It is further asserted that the respondent company initiated the enquiry as per the procedure laid down in Standing orders and the termination of the petitioner in no way violates any provisions of the Act. The respondent prayed or the dismissal of the claim petition.

4. Rejoinder not filed. On the pleadings of the parties, the following issues were framed on 22.3.2016.

1. Whether the termination of the services of the petitioner w.e.f. 30.4.2012 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what service benefits the petitioner is entitled? ...*OPP.*

3. Whether the petition is not maintainable as alleged? ...*OPR.*

4. Whether the petitioner is estopped to file the present petition on account of his own acts, deeds and conduct as alleged? ...*OPR.*

5. Relief.

5. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1 No.

Issue no.2 Becomes redundant.

Issue no.3 No.

Issue no.4 Not pressed.

Relief. Reference answered against the petitioner per operative part of award.

Reasons for findings

Issue no. 1

7. Before, I proceed further, it is important to mention here that after framing of issues, the case was listed for the evidence of petitioner on 11.5.2016 but despite affording many opportunities in order lead evidence, the petitioner has failed to lead any evidence in support of his claim. Hence, on 31.8.2016, this Court was left with no other alternative but to close the evidence of the petitioner.

8. The respondent has examined one Shri B.K Sharma as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as stated in the reply. He also tendered in evidence show cause notice dated 13.4.2012 Ex. RW-1/B, reply to show cause notice Ex. RW-1/C, confessional statement of the petitioner Ex. RW-1/D, enquiry report Ex. RW-1/E and copy of suit for recovery Ex. RW-1/F. In cross-examination, he admitted that Ex. RW-1/B has been issued by the respondent company and that the company suffered a loss of ₹ 2,50,000/-. He further admitted that in the show cause notice Ex. RW-1/B allegations of theft have been leveled against the petitioner and that no FIR had been lodged against him. He denied that the allegations leveled in show cause notice Ex. Rw-1/B, are false and baseless. He admitted that the suit for recovery of ₹ 20,000/- with respect to the theft of mushroom has been filed against the petitioner. He denied that the petitioner had been illegally terminated.

9. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that the petitioner was initially appointed on probation as supervisor for a period of six months and thereafter his services were regularized w.e.f. 19.8.2009. It is also admitted case of the petitioner that a show cause notice/chargesheet dated 13.4.2012 Ex. RW-1/B was issued to him alleging therein that he was caught red handed stealing 100 Kg of mushroom. It is also not disputed that the petitioner filed reply to the aforesaid show cause notice/chargesheet, the copy of which is Ex. RW-1/C which was found unsatisfactory by the management and consequently a domestic enquiry was initiated against the petitioner. The learned counsel for the petitioner contended that a fair and proper enquiry was not held and the enquiry was in violation of the principles of natural justice. In **K.L Tripathi Vs. State Bank of India and ors. AIR 1984 SC 273** while dealing with the concept of natural justice in the back-drop of departmental proceedings, it has been held as under: „It is true that all actions against a party which involve penal or adverse consequences must be in accordance with the principles of natural justice but whether any particular principle of natural justice would be applicable to a particular situation or the question whether there has been any infraction of the application of that principle, has to be judged, in the light of facts and circumstances of each particular case. The basic requirement is that there must be fair play in action and the decision must be arrived at in a just and objective manner with regard to the relevance of the materials and reasons. We must reiterate again that the rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity of cross-examination, it has to be established that prejudice has been caused to the appellant by the procedure followed."

In Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and Others, (1991) 2 SCC 716, the Hon"ble Apex Court laid down that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. The relevant para of the aforesaid judgment is reproduced as under:

"37. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence

Act. The material must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation, etc. seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof, but inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish.……The standard of proof is not proof beyond reasonable doubt but the preponderance of probabilities tending to draw an inference that the fact must be more probable.

10. The aforesaid decision was relied upon by the **Hon'ble Supreme Court in AIR 2005 S.C 570 titled as Cholan Roadways Ltd. Vs. G Thirugnanasambandam**, wherein it has been observed as under:

"17. There cannot, however, be any doubt whatsoever that the principle of natural justice are required to be complied with in a domestic enquiry. It is, however, well-known that the said principle cannot be stretched too far nor can be applied in a vacuum."

"18……."

19. It is further trite that the standard of proof required in a domestic enquiry vis-à-vis a criminal trial is absolutely different. Whereas in the former 'preponderance of probability' would suffice; in the latter, 'proof beyond all reasonable doubt' is imperative."

11. From the aforesaid decisions of the Hon"ble Supreme Court, it has become quite clear that in a domestic enquiry, the principles of natural justice are to be observed on certain parameters and the enquiry is to be fairly and properly conducted. That apart, the proof in a domestic enquiry stands on a different platform that is required in a court of law. Now, in the light of the aforesaid decisions of the Hon'ble Supreme Court, it has to be seen in the present case as to whether there was any violation of principles of natural justice in the enquiry held against the petitioner. As observed earlier, the petitioner has failed to appear in the witness box before this Court despite various opportunities and had failed to substantiate his allegations that the enquiry was not conducted in a fair and proper manner and there had been violation of the principles of natural justice. On the other hand Shri B.K Sharma, Senior Manager of the respondent company tendered in evidence his affidavit Ex. RW-1/A wherein he categorically deposed that an enquiry officer/ committee was appointed in to the charges regarding the misconduct committed by the petitioner and proper procedure as specified under Rule 19(5), (3) and (35) of the Standing Orders as amended up to date and applicable to the petitioner was followed. The petitioner not only pleaded guilty in writing but also revealed that he has been indulging in these acts of theft for quite some time alongwith two other accomplices namely Akhtar Ali and Alok Sharma. He has also placed on record the confessional statement of the petitioner Ex/ RW-1/D wherein the petitioner has admitted that he was caught red handed by the management stealing the mushroom along-with Akhtar Ali and Alok Sharma and he also mentioned in the confessional statement that they had been indulging in the aforesaid acts of theft and had been selling the mushroom in the market. After considering the gravity and seriousness of the misconduct and on the basis of the confessional statement of the petitioner Ex. RW-1/D, the enquiry committee had found him guilty as per the enquiry report Ex. RW-1/E. The perusal of the enquiry report shows that chargesheet was served upon the petitioner for the misconduct during duty hours and his explanation was called for and since his explanation was found unsatisfactory, an enquiry was conducted against him and he was afforded full opportunity before the enquiry committee and when the charges were put to him, the petitioner confessed his guilt in writing. It is not the case of the petitioner that he has never given any confessional statement before the enquiry officer. Neither the petitioner has pleaded nor has led any

evidence to the effect that he has not given the confessional statement Ex. RW-1/D before the enquiry officer. No suggestion has been given to RW-1 by the learned counsel for the petitioner that the confessional statement was not given by the petitioner. Therefore, in the absence of any evidence on record it cannot be said that the enquiry was not conducted in a fair and proper manner. From the scrutiny of the enquiry report as well as entire evidence on record, there can be no iota of doubt that the petitioner was afforded proper opportunity to defend himself and there had been no violation of principles of natural justice. The charges leveled against the petitioner stood duly proved as per the enquiry report Ex. RW-1/E.

12. Now, the question which arises for consideration before this Court is as to whether the punishment imposed by the respondent is disproportionate to the gravity of misconduct. I**n (2005) 3 S.C.C 134, Mahindra and Mahindra Ltd. *Vs*.** N.B Narawade, it has been held by the Hon'ble Supreme Court that after introduction of section 11–A in the Industrial Disputes Act certain amount of discretion is vested with the Labour Court/ Tribunal in interfering with the quantum of punishment whereby the concerned workman is found guilty of the misconduct. The relevant portion of the aforesaid judgment is reproduced as under:

> "20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the workman concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to hereinabove and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment."

In the present case as observed earlier, the charges leveled against the petitioner vide chargesheet dated 13.4.2012 Ex. RW-1/B shows that the petitioner had committed theft of 100 KG of mushroom from the mushroom section of respondent company and had been caught red handed and the aforesaid charges stood duly proved against the petitioner. Such an act on the part of the petitioner causing financial loss to the employer amounts to serious misconduct and the punishment of dismissal imposed upon the petitioner cannot be said to be shockingly disproportionate to the charges proved against him and the same does not call for any interference by this Court under section 11-A of the Act. Moreover, it has further been laid down by the Hon'ble Supreme Court in **Divisional Controller, NEKRTC *v.* H. Amaresh, (2006) 6 SCC 187,** that in such type of cases the loss of confidence is the primary factor and not the amount of money misappropriated and that there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment. The relevant portion of the aforesaid judgment is reproduced as under:'

> "In the instant case, the misappropriation of the funds by the delinquent employee was only Rs.360.95. This Court has considered the punishment that may be awarded to the delinquent employees who misappropriated the funds of the Corporation and the facts to be considered. This Court in a catena of judgments held that the loss of confidence is the primary factor and not the amount of money misappropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an

employee is found guilty of pilferage or of misappropriating the Corporation's funds, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment."

In the case in hand, the petitioner had committed theft and was caught red handed and in his confessional statement he had admitted that he had been indulging in aforesaid acts of theft and had been selling the mushroom in the market. Since, it was a dishonest act, as a result of which the respondent company sustained financial loss as such the respondent is bound to lose faith in such an employee and therefore a lesser punishment cannot be imposed upon the petitioner in the exercise of discretion under section 11-A of the Act. In other words, the order passed by the respondent terminating the services of the petitioner does not call for any interference by this Court.

13. Therefore, in view of my aforesaid discussion, I have no hesitation in holding that the termination of the services of the petitioner w.e.f. 30.4.2012 is legal and justified. Accordingly, issue no.1 is decided in favour of the respondent and against the petitioner.

Issue No. 2

14. Since, the petitioner has failed to prove issue no.1, this issue becomes redundant.

Issue no. 3.

15. In support of this issue, no evidence has been led by the respondent which could go to show as to why the petition is not maintainable. Moreover, the petitioner has filed the present claim pursuant to the reference sent by the appropriate government to this Court for adjudication. Therefore, I find nothing wrong with this claim petition which is perfectly maintainable in the present form.

Issue no. 4.

16. During the course of arguments, the learned counsel for the respondent did not press this issue, hence, the same is decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioner. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 6th day of March, 2017.

(SUSHIL KUKREJA)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Ref no. 2 of 2014.

Instituted on 1.1.2014.

Decided on 6.3.2017.

Alok Sharma S/o Shri Mahesh Sharma R/o Village Sadoli, Kadim, Tehsil Behat, District Sahranpur, UP. ...*Petitioner.*

VS.

Himalya International Ltd. (Government Recognized Export House) Head Office, Subhkhera Paonta Sahib, District Sirmour, HP through its Manager-Human-Resources.
...*Respondent.*

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri Pawnish Kumar, Advocate.

For respondent : Shri Hardeep Verma, Advocate.

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"***Whether termination of the services of Shri Alok Sharma S/o Shri Mahesh Sharma R/o Village Sadoli Kadim Tehsil Behat, District Sahranpur, UP w.e.f. 30.4.2012 by the Managing Director/Employer M/s Himalya International Ltd., Shubhkhera, Paonta Sahib District Sirmour, HP (present office) M/s Himalya International Ltd., E-555, 1st and 2nd Floor Palam Extenstion Sector-7 Dwarka, New Dehli, 110077 (Regd. Office) without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"***

2. Facts, in brief are that initially the petitioner was engaged as supervisor in the department of mushroom house on the basis of probation for six months in the year, 2010 and thereafter his services were regularized. The petitioner had worked with the respondent with utmost honesty, sincerely and to the entire satisfaction of his superiors and no complaint whatsoever had been made with regard to the performance of his official duties. The petitioner is a workman as defined under section 2 (s) of the Industrial Disputes Act, 1947 (hereinafter referred to as Act) and the respondent company is an industry within the ambit of Act. The petitioner had completed 240 days in each calendar year preceding his termination and even before terminating his services neither any notice nor any compensation had been given to him. It is further stated that keeping in view the yearly performance, in the month of Jan., 2012, the respondent had given increment to the petitioner and on 1.1.2012, the respondent had also increased his consolidated salary of ₹ 96000/- per annum. It is further stated that in the year 2012, when petitioner was discharging his duties as per the directions of his senior official, he had received two show cause notices dated 12.3.2012 and 13.4.2014 and that the petitioner had been served 2nd show cause notice dated 13.4.2012 by mentioning that on 12.4.2014, he had stolen 100 KG mushroom from the mushroom section and he

was caught red handed and the company had suffered loss of ₹ 1,50,000/- and the petitioner was directed to submit ₹1,50,000/- to the company and he was called to show cause within two days. That the petitioner had submitted his reply dated 19.4.2012 but without considering his reply, penalty of dismissal/termination was imposed upon him w.e.f. 30.4.2012. The respondent had not followed the basic principles, rules of departmental enquiry proceedings which are necessary as per law. The services of the petitioner had been terminated illegally without complying with the mandatory provisions of the Act. The petitioner had completed 240 days in 12 calendar months and even preceding the date of his illegal termination. The respondent while terminating the services of the petitioner grossly violated the settled principles of law. Against this back-drop a prayer has been made that the respondent be directed to re-instate the petitioner in service with retrospective effect along-with all consequential benefits including back-wages.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken qua maintainability, concealment of material facts, estoppel and that the petitioner is guilty of theft which is grave and gross misconduct. On merits, it has been admitted that initially the petitioner was appointed as supervisor for six months and since 20.2.2011, his services were regularized and since he was working as supervisor, hence, he is no more a workman as defined under section 2 (s) of the Act. It is denied that no notice was given to the petitioner prior to his termination. It is asserted that the petitioner was caught red handed stealing 150 KG of mushroom along-with two other accomplices, resultantly, a show cause notice/chargesheet was served on him and he was asked to submit reply within two days and he submitted his reply on 19.4.2012 which was found unsatisfactory and a departmental enquiry was initiated by appointing an enquiry officer. The petitioner not only pleaded guilty in writing but also revealed that he had been indulging in these acts of theft for quite some time along-with two other accomplices, hence, the charges were proved beyond doubt. The enquiry committee after considering the gravity and seriousness of the misconduct, had no other option but to terminate the services of the petitioner. It is denied that the petitioner was discharging his duties with utmost honesty and to the entire satisfaction of his superiors. It is further asserted that the respondent company initiated the enquiry as per the procedure laid down in Standing orders and the termination of the petitioner in no way violates any provisions of the Act. The respondent prayed or the dismissal of the claim petition.

4. Rejoinder not filed. On the pleadings of the parties, the following issues were framed on 22.3.2016.

1. Whether the termination of the services of the petitioner *w.e.f.* 30.4.2012 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what service benefits the petitioner is entitled? ...*OPP.*

3. Whether the petition is not maintainable as alleged? ...*OPR.*

4. Whether the petitioner is estopped to file the present petition on account of his own acts, deeds and conduct as alleged? ...*OPR.*

5. Relief.

5. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1 No.

Issue no.2 Becomes redundant.

Issue no.3 No.

Issue no.4 Not pressed.

Relief. Reference answered against the petitioner per operative part of award.

Reasons for findings

Issue no. 1

7. Before, I proceed further, it is important to mention here that after framing of issues, the case was listed for the evidence of petitioner on 11.5.2016 but despite affording many opportunities in order lead evidence, the petitioner has failed to lead any evidence in support of his claim. Hence, on 31.8.2016, this Court was left with no other alternative but to close the evidence of the petitioner.

8. The respondent has examined one Shri B.K Sharma as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as stated in the reply. He also tendered in evidence show cause notice dated 13.4.2012 Ex. RW-1/B, reply to show cause notice Ex. RW-1/C, confessional statement of the petitioner Ex. RW-1/D, enquiry report Ex. RW-1/E and copy of suit for recovery Ex. RW-1/F. In cross-examination, he admitted that Ex. RW 1/B has been issued by the respondent company and that the company suffered a loss of ₹ 2,50,000/-. He further admitted that in the show cause notice Ex. RW-1/B allegations of theft have been leveled against the petitioner and that no FIR had been lodged against him. He denied that the allegations leveled in show cause notice Ex. RW-1/B, are false and baseless. He admitted that the suit for recovery of ₹ 20,000/- with respect to the theft of mushroom has been filed against the petitioner. He denied that the petitioner had been illegally terminated.

9. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that the petitioner was initially appointed on probation as supervisor for a period of six months and thereafter his services were regularized w.e.f. 20.2.2011. It is also admitted case of the petitioner that a show cause notice/chargesheet dated 13.4.2012 Ex. RW-1/B was issued to him alleging therein that he was caught red handed stealing 100 Kg of mushroom. It is also not disputed that the petitioner filed reply to the aforesaid show cause notice/chargesheet, the copy of which is Ex. RW-1/C which was found unsatisfactory by the management and consequently a domestic enquiry was initiated against the petitioner. The learned counsel for the petitioner contended that a fair and proper enquiry was not held and the enquiry was in violation of the principles of natural justice. In **K.L Tripathi Vs. State Bank of India and ors. AIR 1984 SC 273** while dealing with the concept of natural justice in the back-drop of departmental proceedings, it has been held as under:

> "It is true that all actions against a party which involve penal or adverse consequences must be in accordance with the principles of natural justice but whether any particular principle of natural justice would be applicable to a particular situation or the question whether there has been any infraction of the application of that principle, has to be judged, in the light of

facts and circumstances of each particular case. The basic requirement is that there must be fair play in action and the decision must be arrived at in a just and objective manner with regard to the relevance of the materials and reasons. We must reiterate again that the rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity of cross-examination, it has to be established that prejudice has been caused to the appellant by the procedure followed."

In Maharashtra State Board of Secondary and Higher Secondary Education v. K.S. Gandhi and Others, (1991) 2 SCC 716, the Hon'ble Apex Court laid down that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. The relevant para of the aforesaid judgment is reproduced as under:

"37. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation, etc. seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof, but inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish.……The standard of proof is not proof beyond reasonable doubt but the preponderance of probabilities tending to draw an inference that the fact must be more probable.

10. The aforesaid decision was relied upon by the **Hon'ble Supreme Court in AIR 2005 S.C 570 titled as Cholan Roadways Ltd. Vs. G Thirugnanasambandam**, wherein it has been obsereved as under:

"17. There cannot, however, be any doubt whatsoever that the principle of natural justice are required to be complied with in a domestic enquiry. It is, however, well-known that the said principle cannot be stretched too far nor can be applied in a vacuum."

"18. ……..."

19. It is further trite that the standard of proof required in a domestic enquiry vis-à-vis a criminal trial is absolutely different. Whereas in the former 'preponderance of probability' would suffice; in the latter, 'proof beyond all reasonable doubt' is imperative."

11. From the aforesaid decisions of the Hon"ble Supreme Court, it has become quite clear that in a domestic enquiry, the principles of natural justice are to be observed on certain parameters and the enquiry is to be fairly and properly conducted. That apart, the proof in a domestic enquiry stands on a different platform that is required in a court of law. Now, in the light of the aforesaid decisions of the Hon'ble Supreme Court, it has to be seen in the present case as to whether there was any violation of principles of natural justice in the enquiry held against the petitioner. As observed earlier, the petitioner has failed to appear in the witness box before this Court despite various opportunities and had failed to substantiate his allegations that the enquiry was not

conducted in a fair and proper manner and there had been violation of the principles of natural justice. On the other hand Shri B.K Sharma, Senior Manager of the respondent company tendered in evidence his affidavit Ex. RW-1/A wherein he categorically deposed that an enquiry officer/ committee was appointed in to the charges regarding the misconduct committed by the petitioner and proper procedure as specified under Rule 19(5), (3) and (35) of the Standing Orders as amended up to date and applicable to the petitioner was followed. The petitioner not only pleaded guilty in writing but also revealed that he has been indulging in these acts of theft for quite some time alongwith two other accomplices namely Pawan Kumar and Akhtar Ali. He has also placed on record the confessional statement of the petitioner Ex/ RW-1/D wherein the petitioner has admitted that he was caught red handed by the management stealing the mushroom along-with Akhtar Ali and Pawan Kumar and he also mentioned in the confessional statement that they had been indulging in the aforesaid acts of theft and had been selling the mushroom in the market. After considering the gravity and seriousness of the misconduct and on the basis of the confessional statement of the petitioner Ex. RW-1/D, the enquiry committee had found him guilty as per the enquiry report Ex. RW-1/E. The perusal of the enquiry report shows that chargesheet was served upon the petitioner for the misconduct during duty hours and his explanation was called for and since his explanation was found unsatisfactory, an enquiry was conducted against him and he was afforded full opportunity before the enquiry committee and when the charges were put to him, the petitioner confessed his guilt in writing. It is not the case of the petitioner that he has never given any confessional statement before the enquiry officer. Neither the petitioner pleaded nor has led any evidence to the effect that he has not given the confessional statement Ex. RW-1/D before the enquiry officer. No suggestion has been given to RW-1 by the learned counsel for the petitioner that the confessional statement was not given by the petitioner. Therefore, in the absence of any evidence on record it cannot be said that the enquiry was not conducted in a fair and proper manner. From the scrutiny of the enquiry report as well as entire evidence on record, there can be no iota of doubt that the petitioner was afforded proper opportunity to defend himself and there had been no violation of principles of natural justice. The charges leveled against the petitioner stood duly proved as per the enquiry report Ex. RW-1/E.

12. Now, the question which arises for consideration before this Court is as to whether the punishment imposed by the respondent is disproportionate to the gravity of misconduct. I**n (2005) 3 S.C.C 134, Mahindra and Mahindra Ltd. Vs**. N.B Narawade, it has been held by the Hon'ble Supreme Court that after introduction of section 11–A in the Industrial Disputes Act certain amount of discretion is vested with the Labour Court/ Tribunal in interfering with the quantum of punishment whereby the concerned workman is found guilty of the misconduct. The relevant portion of the aforesaid judgment is reproduced as under:

> "20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the workman concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to hereinabove and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment."

In the present case as observed earlier, the charges leveled against the petitioner vide chargesheet dated 13.4.2012 Ex. RW-1/B shows that the petitioner had committed theft of 100 KG of mushroom from the mushroom section of respondent company and had been caught red handed and the aforesaid charges stood duly proved against the petitioner. Such an act on the part of the petitioner causing financial loss to the employer amounts to serious misconduct and the punishment of dismissal imposed upon the petitioner cannot be said to be shockingly disproportionate to the charges proved against him and the same does not call any interference by this Court under section 11-A of the Act. Moreover, it has further been laid down by the Hon'ble Supreme Court in **Divisional Controller, NEKRTC v. H. Amaresh, (2006) 6 SCC 187,** that in such type of cases the loss of confidence is the primary factor and not the amount of money misappropriated and that there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment. The relevant portion of the aforesaid judgment is reproduced as under:

> "In the instant case, the misappropriation of the funds by the delinquent employee was only Rs.360.95. This Court has considered the punishment that may be awarded to the delinquent employees who misappropriated the funds of the Corporation and the facts to be considered. This Court in a catena of judgments held that the loss of confidence is the primary factor and not the amount of money misappropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an employee is found guilty of pilferage or of misappropriating the Corporation's funds, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment."

In the case in hand, the petitioner had committed theft and was caught red handed and in his confessional statement he had admitted that he had been indulging in aforesaid acts of theft and had been selling the mushroom in the market Since, it was a dishonest act, as a result of which the respondent company sustained financial loss as such the respondent is bound to lose faith in such an employee and therefore a lesser punishment cannot be imposed upon the petitioner in the exercise of discretion under section 11-A of the Act. In other words, the order passed by the respondent terminating the services of the petitioner does not call for any interference by this Court.

13. Therefore, in view of my aforesaid discussion, I have no hesitation in holding that the termination of the services of the petitioner w.e.f. 30.4.2012 is legal and justified. Accordingly, issue no.1 is decided in favour of the respondent and against the petitioner.

Issue No. 2

14. Since, the petitioner has failed to prove issue no.1, this issue becomes redundant.

Issue no. 3.

15. In support of this issue, no evidence has been led by the respondent which could go to show as to why the petition is not maintainable. Moreover, the petitioner has filed the present claim pursuant to the reference sent by the appropriate government to this Court for adjudication. Therefore, I find nothing wrong with this claim petition which is perfectly maintainable in the present form.

Issue no. 4.

16. During the course of arguments, the learned counsel for the respondent did not press this issue, hence, the same is decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 4, the claim of the petitioner fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioner. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 6th day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Ref no. 82 of 2015.

Instituted on 1.12.2015.

Decided on 22.3.2017.

Ram Lal S/o late Shri Dhangu Ram R/o Village Mashrain, P.O Tharoach, Tehsil Chopal, District Shimla, HP. *...Petitioner.*

VS.

The Divisional forest Officer, Forest Division Chopal, Tehsil Chopal District Shimla, HP. *...Respondent.*

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri Vishal Panwar, Advocate.

For respondent : Ms. Reena Chauhan, Dy. DA.

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"***Whether termination of the services of Shri Ram Lal S/o late Shri Dhangu Ram R/o Village Mashrain, P.O tharoach, Tehsil Chopal District Shimla, H.P by the Divisional Forest Officer, Forest Division Chopal, Tehsil Chopal District Shimla, HP w.e.f 2.1.2014 without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, to what relief of reinstatement, back-wages, seniority and compensation the aggrieved workman is entitled to from the above employer?"***

2. In nutshell the case of the petitioner is that initially he was engaged as daily wage beldar by the respondent department at Mashrain nursery *w.e.f.* 1.11.2011 and he discharged his duties to the satisfaction of his superiors and completed 240 days in each calendar year from

1.11.2011 to 2.1.2014. It is further stated that the respondent department used to mark the artificial breaks of petitioner on some occasion and he was getting daily wages @ 170/- per day and his services had been terminated illegally w.e.f. 2.1.2014. It is also stated that there are more than 100 workers working with the respondent department as daily wagers and the services of the petitioner had been terminated without complying with the provisions of section 25-N of the Industrial Disputes Act, 1947 (hereinafter referred to as Act). It is further stated that the respondent has violated the provisions of sections 25-G and H of the Act by engaging fresh persons. Against this back-drop a prayer has been made that the respondent be directed to re-instate the petitioner in service along-with all consequential benefits including back-wages.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken that the petition is not maintainable, that the petitioner himself used to left the job at his own and that the work provided to the petitioner was seasonal in nature. On merits, it has been asserted that the petitioner was engaged as casual labourer w.e.f. 1.12.2011 and worked only for six days. The petitioner had failed to complete 240 days in any calendar year and the work against which the petitioner was engaged was subject to availability of funds and as such the termination was automatically based on the exhausting of funds and his services were not terminated. It is further asserted that such type of work is also given to the workers on bill basis and no seniority record etc. is maintained by the department and the record of seniority of workers is maintained only in respect of those who are working with the department as daily wagers. It is also asserted that no fresh worker after 2013 had been engaged. The respondent prayed or the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. On the pleadings of the parties, the following issues were framed on 16.6.2016.

1. Whether the termination of the services of the petitioner w.e.f. 2.12.2014 by the respondent without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what service benefits the petitioner is entitled? ...*OPP.*

3. Whether the petition is not maintainable as alleged? ...*OPR.*

Relief.

6. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1	No.
Issue no.2	Becomes redundant.
Issue no.3	No.
Relief.	Reference answered in favour of the respondent and against the petitioner per operative part of award.

Reasons for findings

Issues no. 1.

8. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondent illegally without serving him any notice as required under section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the junior persons to the petitioner are still working with the respondent department and fresh workers have been engaged.

9. On the other hand, Ld. Dy. DA for the respondent contended that the services of the petitioner had been engaged as casual labourer subject to the availability of funds. She further contended that since the petitioner had not completed 240 days in any calendar year and no junior to him had been retained by the respondent, hence, he is not entitled to any relief.

10. To prove issue no.1, the petitioner stepped into the witness box as PW-1 and tendered in evidence his affidavit Ex. PW-1/A wherein he reiterated almost all the averments as stated in the claim petition. He also tendered in evidence the mandays chart for the year, 2011 to 2013 dated 20.2.2015 issued by the DFO Tharoach mark X-1, muster roll w.e.f. 21.11.2011 to 20.12.2011 mark X-2, payment bill/vouchers w.e.f. 26.11.2012 to March, 2014 mark X-3. In cross-examination, he denied that the work was of seasonal nature and that he had left the job at his own. He further denied that the respondent had not terminated his services and that the respondent never used to give artificial breaks as per availability of work.

11. The respondent has examined one Shri Sunil Dutt, Range Forest Officer, Tharoach as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as stated in the reply. He also tendered in evidence authority letter Ex. RW-1/B, mandays chart of petitioner Ex. Rw-1/C, copy of muster roll issued for the work of maintenance of nursery work at Mashrain Ex. RW-1/D and copies of bills on the basis of which the petitioner had worked with the department Ex. RW-1/E to Ex. RW-1/R. In cross-examination, he admitted that the work of all the workers/casual labourers are being supervised by the Forest Guards. He denied that the services of the petitioner were engaged w.e.f. 1.11.2011. He expressed his ignorance that the petitioner was also discharging his duties as chowkidar besides the duties of daily wager. He admitted that the mark X-2 (muster roll) and mark X-3 (bill) were issued by the department. He denied that the juniors to the petitioner are still working with the department. He further denied that the petitioner had completed 240 days in each calendar year.

12. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof, it has become clear that initially the petitioner was engaged as casual labourer w.e.f. 1.12.2011 as is evident from the mandays chart Ex. RW-1/C. The perusal of the mandays chart shows that in the year, 2011, the petitioner had worked for 6 days, 191 days in the year, 2012 and 210 days in the year 2013. From the mandays chart Ex. RW-1/C, it is abundantly clear that the petitioner has not worked for 240 days in preceding twelve months prior to his termination. There is no material on record which could show that the petitioner has completed 240 working days in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 incase titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others***, the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

13. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon"ble Supreme Court has held that:—

> ***"Incase workman claims to have worked for more than 10 years as daily wager. Apart from oral evidence workman has not produced any evidence to prove fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced: no co-worker was examined; muster roll produced by employer has not been contradicted. Workman has failed to discharge his burden that he was in employment for 240 days during preceding 12 months of date of termination of his service. Workman not entitled for protection of Section 25-F before his service was terminated."***

A bare perusal of the extract of the judgment re-produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged on workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in twelve calendar months preceding his termination. From the perusal of mandays chart, Ex. RW-1/C, it is abundantly clear that the petitioner had not completed 240 working days in twelve calendar months preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner.

14. Thus, having regard to the entire evidence on record and on the strength of the above cited rulings, it can safely be concluded that the petitioner has failed to prove on record that he has completed 240 working days in twelve calendar months preceding his termination as it was incumbent upon the petitioner to prove this necessary ingredient that he had completed 240 working days in twelve calendar months preceding his termination.

15. The learned counsel of the petitioner further contended that at the time of the termination of the petitioner, the respondent had retained his juniors who are still working and besides this even fresh persons have been engaged by the respondent as such the respondent had violated the principles of "last come first go". However, except for the bald statement of the petitioner no evidence has been led by him to prove that the persons junior to him have been retained and fresh persons have been engaged by the respondent. Hence, in the absence of any cogent and satisfactory evidence on record, the case of the petitioner does not fall under section 25-G and 25-H of the Act.

16. Thus, in view of the law laid down (supra) and my foregoing discussion, I have no hesitation in holding that the termination of the services of the petitioner w.e.f. 02.1.2014 by the respondent is not illegal and unjustified. Accordingly, issue no.1 is decided in favour of the respondent and against the petitioner.

Issue no. 2.

17. Since, the petitioner has failed to prove issue no.1 above, this issue becomes redundant.

Issue No. 3.

18. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication and I find nothing wrong with this petition which is perfectly maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 3, the claim of the petitioner fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioner. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 22nd day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM- LABOUR COURT, SHIMLA, HIMACHAL PRADESH

Ref No. 69/2009.

Instituted on 17.8.2009.

Decided on 31.03.2017.In re:

Mr. Jagdish Kumar, S/O Sh. Acchar Singh, R/O village Balahar, Po Kujabulh, Tehsil Sarkaghat, District Mandi, HP. *...Workman/petitioner.*

Versus

M/s Rexcin Pharmaceuticals Pvt. Ltd, Khasra No. 105-106, village Katha, Baddi- 173205 (H.P.) *...Management/respondent.*

Reference under Section 10 of the Industrial Dispute, Act, 1947

For the petitioner : Sh. P S Chandel, Advocate.

For the respondent : Sh. K M Tripathi, Advocate.

AWARD

The following reference has been sent by the appropriate Government for adjudication:

"Whether the termination of services of Sh. Dinesh Kumar, S/O Sh. Bansi Ram workman by the Managing Director M/S Rexine Pharmaceuticals Pvt. Ltd., Khasra No. 105-106 village Katha Baddi, Tehsil Nalagarh, District Solan, HP w.e.f. 28.12.2007 without complying with the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"

2. In nut shell, the case of the petitioner is that he was engaged by the respondent in the year 2006, on permanent/regular basis and continued his job to the entire satisfaction of the respondent. The salary of the petitioner was fixed at ₹ 2250/- per month excluding over time and other dues. The petitioner worked till 31.12.2008 without any break and had completed 240 days in calendar year. The respondent-company had suspended/terminated the services of the petitioner on 31.12.2008 without giving any notice or paying any amount in lieu thereof. Neither any domestic enquiry was held nor any opportunity of being heard was given to the petitioner before terminating his services. On the basis of these averments the petitioner has prayed that his claim be allowed and he be given back wages in the sum of Rs. 1,50,120/- besides an amount of ₹ 50,000/- be paid to him on account of mental harassment etc.

3. By filing reply, the respondent had contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, order of the reference bad in law, illegal and that the claim has not been filed as per the provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is submitted that the petitioner joined the company *w.e.f.* 17.11.2006 and he committed grave misconducts for which he was suspended from duties and after holding proper enquies, he was dismissed from the employment vide letter dated 28.12.2007 and during his employment he was provided all the benefits to which he was legally entitled. That fair and proper enquiries were held against the petitioner and due opportunities to defend himself were afforded to him in respect of the charges leveled against him. The petitioner alongwith other workers resorted to strike without prior notice w.e.f 8.1.2007 in the factory and remained on strike from 9.1.2007 to 19.1.2007 outside the factory and on 19.1.2007, the labour officer held the meeting alongwith labour inspector, management and workers and the labour officer directed the workers to report for duty *w.e.f.* 29.1.2007. That the petitioner alongwith other workers again resorted to strike without prior notice w.e.f. 29.1.2007 and committed grave misconduct for which he was suspended from duties vide letter dated 29.1.2007 and thereafter he was issued two chargesheets dated 5.2.2007 and he submitted his explanation *vide* letter dated 7.3.2007 which was not found satisfactory, hence, domestic enquiries were constituted by the management vide its letters dated 23.3.2007 and during the enquiries the management produced its witnesses and the petitioner was provided opportunity to cross-examine management witnesses and to led his evidence in defence. All the requests, objections and contentions of the parties either verbal or in writing through letters were recorded during enquiries by the enquiry officer. The copy of enquiry proceedings were furnished to both the parties and the enquiry officer conducted the enquiries in a fair and proper manner and submitted his reports alongwith the enquiry proceedings to the management and the copy of enquiry reports alongwith show cause notices were furnished to the petitioner, who submitted his reply which was not found satisfactory, hence dismissed vide dismissal order dated 28.12.2007 which was issued to him and full and final settlement amount was also sent to him. The petitioner is not entitled to ₹ 1,50,120/- as back wages and ₹ 50,000/- on account of mental harassment, torture, pain etc. The petitioner is gainfully employed. The respondent prayed for the dismissal of the claim petition.

4. Rejoinder not filed. Before, I proceed further, it is important to mention here that on 23.4.2011, an application was moved by the respondent for framing of preliminary issue regarding fairness of enquiry which was allowed on 5.9.2011 and following issue was framed and ordered to be treated as preliminary issue.

1. Whether the enquiry conducted by the management is fair and proper? ...*OPR.*

2. Relief.

5. *Vide* order dated 9.3.2017, this Court decided the preliminary issue in favour of the respondent and against the petitioner and it was held as under:

"In view of my foregoing discussion on preliminary issue, since, the enquiries have been held to be fair and proper, therefore, let the parties be heard on the point as to whether the punishment of dismissal imposed by the respondent upon the petitioner is dis-proportionate to the gravity of misconduct committed by him."

6. I have heard Ld counsel for the parties and also gone through the record of the case file carefully.

7. As noted above, preliminary issue has already been decided in favour of the respondent management and against the workman holding that the enquiries conducted by the management against the workman were fair and proper and in accordance with principles of natural justice and the charges leveled against the petitioner stood duly proved. Hence, the only question to be decided by this Court is whether, punishment of dismissal imposed upon the petitioner/workman in respect of the charges proved against him in the enquiries is justified or not and whether the punishment of dismissal imposed by the respondent upon the petitioner is dis-proportionate to the gravity of misconduct committed by him.

8. It is by now well settled that after introduction of Section 11-A of the Industrial Disputes Act, Labour Court has the power to set-aside the order of discharge or dismissal or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal, as the circumstances of the case may require. However, it cannot be said that powers of the Labour Court under Section 11-A of the Act, are absolute or un-qualified. The Labour Court can exercise the said powers only when it is satisfied that order of dismissal or discharge was not justified.

9. In **Mahindra and Mahindra Ltd versus N B Naravade etc., AIR, 2005, SC 1993** it has been held by the Hon'ble Apex Court as under:

> "20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/ Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the concerned workman is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to herein above and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court can not by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment"

10. In **L & T Komatsu Ltd versus N. Udaya kumar (2008) 1 SCC 224,** the Hon'ble Supreme Court has relied upon its earlier decision in **LIC of India versus R Dhandapani, AIR 2006 SC, 615,** wherein, it was held as under:

> "It is not necessary to go into in detail regarding the power exercisable under Section 11-A of the Act. The power under said Section 11-A has to be exercised judiciously and the Industrial Tribunal or the Labour Court, as the case may be, is expected to interfere with the decision of a management under Section 11-A of the

> Act only when it is satisfied that punishment imposed by the management is wholly and shockingly disproportionate to the degree of guilt of the workman concerned. To support its conclusion the Industrial Tribunal or the Labour Court, as the case may be, has to give reasons in support of its decision. The power has to be exercised judiciously and mere use of the words 'disproportionate' or' grossly disproportionate' by itself will not be sufficient.
>
> In recent times, there is an increasing evidence of this, perhaps well-meant but wholly unsustainable, tendency towards a denudation of the legitimacy of judicial reasoning and process. The reliefs granted by the Courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the Courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability. (See: Kerala Solvent Extractions Ltd. *v.* A. Unnikrishnan and Another, 1994 (1) SCALE 631.

Though under Section 11-A, the Tribunal has the power to reduce the quantum of punishment it has to be done within the parameters of law. Possession of power is itself not sufficient; it has to be exercised in accordance with law."

11. In **M. P Electricity Board versus Jagdish Chandra Sharma, in (2005) 3 SCC 401,** wherein, the Hon'ble Supreme Court has held as under:

> "20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the concerned workman is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to herein above and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11- A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court can not by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment.

12. It is clear from the aforesaid decisions of the Hon'ble Supreme Court that although this Court has ample powers to interfere with the punishment imposed upon the workman, the power is not arbitrary and it is to be exercised judicially and in accordance with law. The punishment imposed upon the workman can be interfered only if the Court is satisfied that the punishment is wholly and shockingly disproportionate to the nature of misconduct proved against the workman or if there are any mitigating circumstances including the past conduct of the workman which may persuade the Court to reduce the punishment.

13. Admittedly, two charge sheets were issued against the petitioner and both the chargesheets are of dated 5.2.2007. One charge sheet was issued against the petitioner in which the charges against him are that he alongwith other workers resorted to strike without prior notice w.e.f. 31.1.2007 and also intimidated and instigated other workers and prevented them from joining the duties by creating violent atmosphere. He had also shouted slogans against the management alongwith other workers and used indecent language against their superiors. At about 12:30 PM, on 31.1.2007, he alongwith other workers had stopped the Maruti Vehicle of the company bearing registration No. HP12A-8356 at factory gate. In the other charge sheet issued against him charges are that he alongwith other workers resorted to strike without prior notice w.e.f. 29.1.2007 and also intimidated and instigated other workers and prevented them from joining the duties by creating violent atmosphere as a result of which police had to be called. He had also shouted slogans against the management alongwith other workers and used indecent language against their superiors. He alongwith other workers had also resorted to strike w.e.f. 8.1.2007 inside the factory and remained on strike from 9.1.2007 to 19.1.2007 outside the factory. The enquiry authority had conducted two separate enquiries with respect to both charge sheets issued against the petitioner and the charges levelled against the petitioner in both these chargesheets dated 05.02.2007, stood proved. As already observed, this Court had also given its findings on preliminary issue on 9.3.2017 that both the enquiries conducted by the management against the petitioner were fair and proper and the charges leveled against the petitioner stood duly proved.

14. In the facts and circumstances of the present case, in my opinion the action of dismissal of the workman cannot be said to be unjustifiable. From the evidence on record, it has been proved that the petitioner was responsible for strike and he shouted slogans and had also intimidated and instigated other workers to join the strike and further that he was found guilty of preventing willing workers from reporting to work. He had taken leading part in the strike which started from 29.1.2007. The strike could not be said to be legal nor it could be said to be justified. In my view leading and resorting to strike and taking part in the illegal strike is a serious misconduct. The petitioner has committed serious misconduct relating to discipline and his act was subserved to the discipline in this behalf. The respondent-management was completely justified in dismissing the petitioner from service. The punishment was proportionate to the serious misconduct alleged against him. Therefore, in view of the gravity of the misconduct and the degree of culpability on the part of the petitioner, this Court does not find it proper to interfere in the punishment of dismissal imposed by the respondent/management upon the petitioner. Hence, it can safely be held that the termination of the services of the petitioner w.e.f. 28.12.2007 is proper and justified.

Relief:

15. As a sequel to my aforesaid discussion, the claim of the petitioner fails and is hereby dismissed. Consequently, the reference stands answered against the petitioner and in favour of the respondent. Let a copy of this award be sent to the appropriate Government for publication in official gazette. File after completion be consigned to the records.

Announced and signed in the Open Court today on this 31st day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal -cum Labour Court,
Shimla, HP.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM- LABOUR COURT, SHIMLA, HIMACHAL PRADESH

Ref No. 71/2009.

Instituted on 17.8.2009.

Decided on 31.03.2017.In re:

Mr. Amit Kumar, S/O Sh. Hem Raj, village Sihoti, Post Office Jilari, Tehsil Nadaun, District Bilaspur, HP. *...Workman/petitioner.*

Versus

Managing Director, M/s Rexcin Pharmaceuticals Pvt. Ltd, Khasra No. 105-106, village Katha, Baddi- 173205 (H.P.) *...Management/respondent.*

Reference under Section 10 of the Industrial Dispute, Act, 1947

For the petitioner: Sh. P S Chandel, Advocate.

For the respondent: Sh. K M Tripathi, Advocate.

AWARD

The following reference has been sent by the appropriate Government for adjudication:

"Whether the termination of services of Sh. Dinesh Kumar, S/O Sh. Bansi Ram workman by the Managing Director M/S Rexine Pharmaceuticals Pvt. Ltd., Khasra No. 105-106 village Katha Baddi, Tehsil Nalagarh, District Solan, HP *w.e.f.* 28.12.2007 without complying with the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"

2. In nut shell, the case of the petitioner is that he was engaged by the respondent in the year 2006, on permanent/regular basis and continued his job to the entire satisfaction of the respondent. The salary of the petitioner was fixed at ₹ 2250/- per month excluding over time and other dues. The petitioner worked till 31.12.2008 without any break and had completed 240 days in calendar year. The respondent-company had suspended/terminated the services of the petitioner on 31.12.2008 without giving any notice or paying any amount in lieu thereof. Neither any domestic enquiry was held nor any opportunity of being heard was given to the petitioner before terminating his services. On the basis of these averments the petitioner has prayed that his claim be allowed and he be given back wages in the sum of Rs. 1,50,120/- besides an amount of ₹50,000/- be paid to him on account of mental harassment etc.

3. By filing reply, the respondent had contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, order of the reference bad in law, illegal and that the claim has not been filed as per the provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is submitted that the petitioner joined the company w.e.f. 17.11.2006 and he committed grave misconduct for which he was suspended from duties and after holding proper enquiry, he was dismissed from the employment vide letter dated 28.12.2007 and during his employment he was provided all the benefits to which he was legally entitled. That a fair

and proper enquiry was held against the petitioner and due opportunities to defend himself were afforded to him in respect of the charges leveled against him. The petitioner alongwith other workers resorted to strike without prior notice w.e.f 8.1.2007 in the factory and remained on strike from 9.1.2007 to 19.1.2007 outside the factory and on 19.1.2007, the labour officer held the meeting alongwith labour inspector, management and workers and the labour officer directed the workers to report for duty *w.e.f.* 29.1.2007. That the petitioner alongwith other workers again resorted to strike without prior notice w.e.f. 29.1.2007 and committed grave misconduct for which he was suspended from duties vide letter dated 31.1.2007 and thereafter he was issued the chargesheet dated 5.2.2007 and he submitted his explanation vide letter dated nil which was not found satisfactory, hence, a domestic enquiry was constituted by the management vide its letter dated 23.3.2007 and during the enquiry the management produced its witnesses and the petitioner was provided opportunity to cross-examine management witnesses and to led his evidence in defence. All the requests, objections and contentions of the parties either verbal or in writing through letters were recorded during enquiry by the enquiry officer. The copy of enquiry proceedings were furnished to both the parties and the enquiry officer conducted the enquiry in a fair and proper manner and submitted his report alongwith the enquiry proceedings to the management and the copy of enquiry report alongwith show cause notice was furnished to the petitioner, who submitted his reply which was not found satisfactory, hence dismissed vide dismissal order dated 28.12.2007 which was issued to him and full and final settlement amount was also sent to him. The petitioner is not entitled to ₹ 1,50,120/- as back wages and ₹ 50,000/- on account of mental harassment, torture, pain etc. The petitioner is gainfully employed. The respondent prayed for the dismissal of the claim petition.

4. Rejoinder not filed. Before, I proceed further, it is important to mention here that on 23.4.2011, an application was moved by the respondent for framing of preliminary issue regarding fairness of enquiry which was allowed on 5.9.2011 and following issue was framed and ordered to be treated as preliminary issue.

1. Whether the enquiry conducted by the management is fair and proper? ...*OPR.*

2. Relief.

5. *Vide* order dated 9.3.2017, this Court decided the preliminary issue in favour of the respondent and against the petitioner and it was held as under:

> "In view of my foregoing discussion on preliminary issue, since, the enquiry has been held to be fair and proper, therefore, let the parties be heard on the point as to whether the punishment of dismissal imposed by the respondent upon the petitioner is dis-proportionate to the gravity of misconduct committed by him."

6. I have heard Ld counsel for the parties and also gone through the record of the case file carefully.

7. As noted above, preliminary issue has already been decided in favour of the respondent management and against the workman holding that the enquiry conducted by the management against the workman was fair and proper and in accordance with principles of natural justice and the charges leveled against the petitioner stood duly proved. Hence, the only question to be decided by this Court is whether, punishment of dismissal imposed upon the petitioner/workman in respect of the charges proved against him in the enquiry is justified or not and whether the punishment of dismissal imposed by the respondent upon the petitioner is dis-proportionate to the gravity of misconduct committed by him.

8. It is by now well settled that after introduction of Section 11-A of the Industrial Disputes Act, Labour Court has the power to set-aside the order of discharge or dismissal or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal, as the circumstances of the case may require. However, it cannot be said that powers of the Labour Court under Section 11-A of the Act, are absolute or un-qualified. The Labour Court can exercise the said powers only when it is satisfied that order of dismissal or discharge was not justified.

9. In **Mahindra and Mahindra Ltd versus N B Naravade etc., AIR, 2005, SC 1993** it has been held by the Hon'ble Apex Court as under:

> "20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the concerned workman is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to herein above and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court can not by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment"

10. In **L & T Komatsu Ltd versus N. Udaya kumar (2008) 1 SCC 224,** the Hon'ble Supreme Court has relied upon its earlier decision in **LIC of India versus R Dhandapani, AIR 2006 SC, 615,** wherein, it was held as under:

> "It is not necessary to go into in detail regarding the power exercisable under Section 11-A of the Act. The power under said Section 11-A has to be exercised judiciously and the Industrial Tribunal or the Labour Court, as the case may be, is expected to interfere with the decision of a management under Section 11-A of the Act only when it is satisfied that punishment imposed by the management is wholly and shockingly disproportionate to the degree of guilt of the workman concerned. To support its conclusion the Industrial Tribunal or the Labour Court, as the case may be, has to give reasons in support of its decision. The power has to be exercised judiciously and mere use of the words `disproportionate' or 'grossly disproportionate' by itself will not be sufficient.
>
> In recent times, there is an increasing evidence of this, perhaps well-meant but wholly unsustainable, tendency towards a denudation of the legitimacy of judicial reasoning and process. The reliefs granted by the Courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the Courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability.

(See: Kerala Solvent Extractions Ltd. v. A. Unnikrishnan and Another, 1994 (1) SCALE 631. Though under Section 11-A, the Tribunal has the power to reduce the quantum of punishment it has to be done within the parameters of law. Possession of power is itself not sufficient; it has to be exercised in accordance with law."

11 In **M. P Electricity Board versus Jagdish Chandra Sharma, in (2005) 3 SCC 401,** wherein, the Hon'ble Supreme Court has held as under:

" 20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the concerned workman is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to herein above and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court can not by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment.

12. It is clear from the aforesaid decisions of the Hon'ble Supreme Court that although this Court has ample powers to interfere with the punishment imposed upon the workman, the power is not arbitrary and it is to be exercised judicially and in accordance with law. The punishment imposed upon the workman can be interfered only if the Court is satisfied that the punishment is wholly and shockingly disproportionate to the nature of misconduct proved against the workman or if there are any mitigating circumstances including the past conduct of the workman which may persuade the Court to reduce the punishment.

13. Admittedly, the charges against the petitioner are that he alongwith other workers resorted to strike without prior notice w.e.f. 31.1.2007 and also intimidated and instigated other workers and prevented them from joining the duties by creating violent atmosphere. He had also shouted slogans against the management alongwith other workers and used indecent language against their superiors. At about 12:30 PM, on 31.1.2007, he alongwith other workers had stopped the Maruti Vehicle of the company bearing registration No. HP12A-8356 at factory gate. The aforesaid charges have been levelled against the petitioner vide chargesheet dated 5.2.2007 and an enquiry was conducted against him. The enquiry officer had given his findings against the petitioner and the charges levelled against the petitioner stood proved. As already observed, this Court had also given its findings on preliminary issue on 9.3.2017 that the enquiry conducted by the management against the petitioner was fair and proper and the charges leveled against the petitioner stood duly proved.

14. In the facts and circumstances of the present case, in my opinion the action of dismissal of the workman cannot be said to be unjustifiable. From the evidence on record, it has been proved that the petitioner was responsible for strike and he shouted slogans and had also intimidated and instigated other workers to join the strike and further that he was found guilty of preventing willing workers from reporting to work. He had taken leading part in the strike which started from 29.1.2007. The strike could not be said to be legal nor it could be said to be justified. In my view leading and resorting to strike and taking part in the illegal strike is a serious misconduct. The petitioner has committed serious misconduct relating to discipline and his act was

subserved to the discipline in this behalf. The respondent-management was completely justified in dismissing the petitioner from service. The punishment was proportionate to the serious misconduct alleged against him. Therefore, in view of the gravity of the misconduct and the degree of culpability on the part of the petitioner, this Court does not find it proper to interfere in the punishment of dismissal imposed by the respondent/management upon the petitioner. Hence, it can safely be held that the termination of the services of the petitioner w.e.f. 28.12.2007 is proper and justified.

Relief:

15. As a sequel to my aforesaid discussion, the claim of the petitioner fails and is hereby dismissed. Consequently, the reference stands answered against the petitioner and in favour of the respondent. Let a copy of this award be sent to the appropriate Government for publication in official gazette. File after completion be consigned to the records.

Announced and signed in the Open Court today on this 31st day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal -cum Labour Court,
Shimla, HP.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM- LABOUR COURT, SHIMLA, HIMACHAL PRADESH

Ref No. 70/2009.

Instituted on 17.8.2009.

Decided on 31.03.2017.In re:

Mr. Dinesh Kumar, Sh. Bansi Ram, village Maretta, Post Office Jejwin, Tehsil Jhandutta, District Bilaspur, HP. *...Workman/petitioner.*

Versus

M/s Rexcin Pharmaceuticals Pvt. Ltd, Khasra No. 105-106, village Katha, Baddi-173205 (H.P.) *...Management/respondent.*

Reference under Section 10 of the Industrial Dispute, Act, 1947

For the petitioner : Sh. P S Chandel, Advocate.

For the respondent : Sh. K M Tripathi, Advocate.

AWARD

The following reference has been sent by the appropriate Government for adjudication:

"Whether the termination of services of Sh. Dinesh Kumar, S/O Sh. Bansi Ram workman by the Managing Director M/S Rexine Pharmaceuticals Pvt. Ltd., Khasra No. 105-106 village Katha Baddi, Tehsil Nalagarh, District Solan, HP w.e.f. 28.12.2007 without complying with the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"

2. In nut shell, the case of the petitioner is that he was engaged by the respondent in the year 2006, on permanent/regular basis and continued his job to the entire satisfaction of the respondent. The salary of the petitioner was fixed at ₹ 2250/- per month excluding over time and other dues. The petitioner worked till 31.12.2008 without any break and had completed 240 days in calendar year. The respondent-company had suspended/terminated the services of the petitioner on 31.12.2008 without giving any notice or paying any amount in lieu thereof. Neither any domestic enquiry was held nor any opportunity of being heard was given to the petitioner before terminating his services. On the basis of these averments the petitioner has prayed that his claim be allowed and he be given back wages in the sum of Rs. 1,50,120/- besides an amount of ₹ 50,000/- be paid to him on account of mental harassment etc.

3. By filing reply, the respondent had contested the claim of the petitioner wherein preliminary objections had been taken qua maintainability, order of the reference bad in law, illegal and that the claim has not been filed as per the provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is submitted that the petitioner joined the company w.e.f. 17.11.2006 and he committed grave misconduct for which he was suspended from duties and after holding proper enquiry, he was dismissed from the employment vide letter dated 28.12.2007 and during his employment he was provided all the benefits to which he was legally entitled. That a fair and proper enquiry was held against the petitioner and due opportunities to defend himself were afforded to him in respect of the charges leveled against him. The petitioner alongwith other workers resorted to strike without prior notice w.e.f 8.1.2007 in the factory and remained on strike from 9.1.2007 to 19.1.2007 outside the factory and on 19.1.2007, the labour officer held the meeting alongwith labour inspector, management and workers and the labour officer directed the workers to report for duty w.e.f. 29.1.2007. That the petitioner alongwith other workers again resorted to strike without prior notice w.e.f. 29.1.2007 and committed grave misconduct for which he was suspended from duties vide letter dated 29.1.2007 and thereafter he was issued the chargesheet dated 5.2.2007 and he submitted his explanation vide letter dated nil which was not found satisfactory, hence, a domestic enquiry was constituted by the management vide its letter dated 23.3.2007 and during the enquiry the management produced its witnesses and the petitioner was provided opportunity to cross-examine management witnesses and to led his evidence in defence. All the requests, objections and contentions of the parties either verbal or in writing through letters were recorded during enquiry by the enquiry officer. The copy of enquiry proceedings were furnished to both the parties and the enquiry officer conducted the enquiry in a fair and proper manner and submitted his report alongwith the enquiry proceedings to the management and the copy of enquiry report alongwith show cause notice was furnished to the petitioner, who submitted his reply which was not found satisfactory, hence dismissed vide dismissal order dated 28.12.2007 which was issued to him and full and final settlement amount was also sent to him. The petitioner is not entitled to Rs 1,50,120/- as back wages and Rs 50,000/- on account of mental harassment, torture, pain etc. The petitioner is gainfully employed. The respondent prayed for the dismissal of the claim petition.

4. Rejoinder not filed. Before, I proceed further, it is important to mention here that on 23.4.2011, an application was moved by the respondent for framing of preliminary issue regarding fairness of enquiry which was allowed on 5.9.2011 and following issue was framed and ordered to be treated as preliminary issue.

1. Whether the enquiry conducted by the management is fair and proper? ...*OPR.*

2. Relief.

5. *Vide* order dated 9.3.2017, this Court decided the preliminary issue in favour of the respondent and against the petitioner and it was held as under:

> "In view of my foregoing discussion on preliminary issue, since, the enquiry has been held to be fair and proper, therefore, let the parties be heard on the point as to whether the punishment of dismissal imposed by the respondent upon the petitioner is dis-proportionate to the gravity of misconduct committed by him."

6. I have heard Ld counsel for the parties and also gone through the record of the case file carefully.

7. As noted above, preliminary issue has already been decided in favour of the respondent management and against the workman holding that the enquiry conducted by the management against the workman was fair and proper and in accordance with principles of natural justice and the charges leveled against the petitioner stood duly proved. Hence, the only question to be decided by this Court is whether, punishment of dismissal imposed upon the petitioner/workman in respect of the charges proved against him in the enquiry is justified or not and whether the punishment of dismissal imposed by the respondent upon the petitioner is dis-proportionate to the gravity of misconduct committed by him.

8. It is by now well settled that after introduction of Section 11-A of the Industrial Disputes Act, Labour Court has the power to set-aside the order of discharge or dismissal or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal, as the circumstances of the case may require. However, it cannot be said that powers of the Labour Court under Section 11-A of the Act, are absolute or un-qualified. The Labour Court can exercise the said powers only when it is satisfied that order of dismissal or discharge was not justified.

9. In **Mahindra and Mahindra Ltd versus N B Naravade etc., AIR, 2005, SC 1993** it has been held by the Hon'ble Apex Court as under:

"20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the concerned workman is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to herein above and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court can not by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment"

10. In **L & T Komatsu Ltd versus N. Udaya kumar (2008) 1 SCC 224,** the Hon'ble Supreme Court has relied upon its earlier decision in **LIC of India versus R Dhandapani, AIR 2006 SC, 615,** wherein, it was held as under:

"It is not necessary to go into in detail regarding the power exercisable under Section 11-A of the Act. The power under said Section 11-A has to be exercised judiciously and the Industrial Tribunal or the Labour Court, as the case may be, is expected to interfere with the decision of a managementunder Section 11-A of the Act only when it is satisfied that punishment imposed by the management is wholly and shockingly disproportionate to the degree of guilt of the workman concerned. To support its conclusion the Industrial Tribunal or the Labour Court, as the case may be, has to give reasons in support of its decision. The power has to be exercised judiciously and mere use of the words `disproportionate' or `grossly disproportionate' by itself will not be sufficient.

In recent times, there is an increasing evidence of this, perhaps well-meant but wholly unsustainable, tendency towards a denudation of the legitimacy of judicial reasoning and process. The reliefs granted by the Courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the Courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability. (See: Kerala Solvent Extractions Ltd. v. A. Unnikrishnan and Another, 1994 (1) SCALE 631. Though under Section 11-A, the Tribunal has the power to reduce the quantum of punishment it has to be done within the parameters of law. Possession of power is itself not sufficient; it has to be exercised in accordance with law."

11. In **M. P Electricity Board versus Jagdish Chandra Sharma, in (2005) 3 SCC 401,** wherein, the Hon'ble Supreme Court has held as under:

" 20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the labour court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the concerned workman is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to herein above and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court can not by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment.

12. It is clear from the aforesaid decisions of the Hon'ble Supreme Court that although this Court has ample powers to interfere with the punishment imposed upon the workman, the power is not arbitrary and it is to be exercised judicially and in accordance with law. The punishment imposed upon the workman can be interfered only if the Court is satisfied that the punishment is wholly and shockingly disproportionate to the nature of misconduct proved against the workman or if there are any mitigating circumstances including the past conduct of the workman which may persuade the Court to reduce the punishment.

13. Admittedly, the charges against the petitioner are that he alongwith other workers resorted to strike without prior notice w.e.f. 29.1.2007 and also intimidated and instigated other workers and prevented them from joining the duties by creating violent atmosphere as a result of which police had to be called. He had also shouted slogans against the management alongwith other workers and used incedent language against their superiors. He alongwith other workers had also resorted to strike w.e.f. 8.1.2007 inside the factory and remained on strike from 9.1.2007 to 19.1.2007 outside the factory. The aforesaid charges have been levelled against the petitioner vide chargesheet dated 5.2.2007 and an enquiry was conducted against him. The enquiry officer had given his findings against the petitioner and the charges levelled against the petitioner stood proved. As already observed, this Court had also given its findings on preliminary issue on 9.3.2017 proper and the charges leveled against the petitioner stood duly proved.

14. In the facts and circumstances of the present case, in my opinion the action of dismissal of the workman cannot be said to be unjustifiable. From the evidence on record, it has been proved that the petitioner was responsible for strike and he shouted slogans and had also intimidated and instigated other workers to join the strike and further that he was found guilty of preventing willing workers from reporting to work. He had taken leading part in the strike which started from 29.1.2007. The strike could not be said to be legal nor it could be said to be justified. In my view leading and resorting to strike and taking part in the illegal strike is a serious misconduct. The petitioner has committed serious misconduct relating to discipline and his act was subserved to the discipline in this behalf. The respondent-management was completely justified in dismissing the petitioner from service. The punishment was proportionate to the serious misconduct alleged against him. Therefore, in view of the gravity of the misconduct and the degree of culpability on the part of the petitioner, this Court does not find it proper to interfere in the punishment of dismissal imposed by the respondent/management upon the petitioner. Hence, it can safely be held that the termination of the services of the petitioner w.e.f. 28.12.2007 is proper and justified.

Relief:

15. As a sequel to my aforesaid discussion, the claim of the petitioner fails and is hereby dismissed. Consequently, the reference stands answered against the petitioner and in favour of the respondent. Let a copy of this award be sent to the appropriate Government for publication in official gazette. File after completion be consigned to the records.

Announced and signed in the Open Court today on this 31st day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal- cum Labour Court,
Shimla, HP.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Ref no. 66 of 2014.

Instituted on 13.8.2014.

Decided on 31.3.2017.

Thakur Singh S/o Shri Chandu Lal R/o Village Kalgan (Randol), P.O Tattapani, Tehsil Karsong, District Mandi, HP. ...*Petitioner.*

VS.

The Divisional Forest Officer, Shimla, HP. ...*Respondent.*

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri R.K Chauva, Advocate.

For respondent : Ms. Reena Chauhan, Dy. DA.

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

> **"Whether termination of the services of Shri Thakur Singh S/o Shri Chandu Lal R/o Village Kalgan (Randol), P.O Tattapani, Tehsil Karsong, District Mandi, HP during year, 2011 by the Divisional Forest Officer, Shimla Forest Division, Shimla District Shimla HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? IF not, what amount of back-wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"**

2. In nutshell the case of the petitioner is that he was employed as beldar on daily wage basis by the respondent department on 1.1.2005 and remained as such till December, 2011 when he was removed from service without compliance of statutory and mandatory provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is further averred that the petitioner had worked with the respondent for more than 240 days during the preceding calendar year and his services have been terminated without complying with the provisions of sections 25-G, 25-H and 25-N of the Act and even during the entire service tenure, the petitioner was never served with any explanation call, show cause notice and warning letter and even his work and conduct remained excellent during his service period. It is further averred that juniors to the petitioner have been retained by the department in violation of section 25-G of the Act and that he had not abandoned his job. Against this back-drop a prayer has been made that the respondent be directed to re-instate the petitioner in service along-with all consequential benefits including back-wages.

3. By filing reply, the respondent contested the claim of the petitioner wherein it has been asserted that the petitioner was engaged as casual labourer in the year, 2005 for forestry works which are seasonal in nature and such type of works are not in operation throughout the year and depends on the availability of funds and the petitioner was not engaged to any cadre of post in accordance with rules but he had been engaged on the basis of need of work and even he had not completed 240 days in a year except the year, 2006. Since, the forestry works are seasonal in nature and are to be completed in a time bound manner for which adequate labour is engaged, the petitioner as well as other labourers were engaged to execute forestry works seasonally and after the completion of the work, entire labour used to be disengaged for want of work and funds. The services of the petitioner were never terminated who had left the job at his own and did not turn up for work. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. On the pleadings of the parties, the following issues were framed on 15.9.2015.

1. Whether the termination of the services of the petitioner during 2011 is in violation of the provisions of the Industrial Disputes Act, 1947 as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what relief of service benefits the petitioner is entitled? ...*OPP.*

3. Relief.

6. I have heard the learned counsel for the petitioner and learned Dy. DA for respondent and have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1 No.

Issue no.2 Becomes redundant.

Relief. Reference answered in favour of the respondent and against the petitioner per operative part of award.

Reasons for findings

Issues no. 1.

8. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondent illegally without serving him any notice as required under section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the junior persons to the petitioner are still working with the respondent department and fresh workers have been engaged in violation of sections 25-G and 25-H of the Act.

9. On the other hand, Ld. Dy. DA for the respondent contended that the services of the petitioner had been engaged as casual seasonal labourer subject to the availability of work and funds. She further contended that since the petitioner had not completed 240 days in any calendar year and no junior to him had been retained by the respondent, hence, he is not entitled to any relief.

10. To prove issue no.1, the petitioner stepped into the witness box as PW-1 and tendered in evidence his affidavit Ex. PW-1/A wherein he reiterated almost all the averments as stated in the claim petition. In cross-examination, he admitted that the work was on seasonal basis and other labourers were also working with him. He denied that the work was on co-terminus basis. He admitted that he had not completed 240 working days in any calendar year except the year, 2006. He denied that the workers who were engaged along-with him or after him have also been removed. Om Prakash and Nek Chand who were junior to him are still working with the department on a regular post. He denied that the Nek Chand and Om Prakash never seized their work with the department. He admitted that he had not made any representation to the department for his re-instatement. He denied that he used to leave the job at his own.

11. PW-2 Shri Krishan Chand Range Forest Officer Sunni produced on record the mandays chart of Nek Chand Ex. PW-2/A, mandays chart of Om Prakash Ex. PW-2/B, mandays chart of Leela Dass Ex. PW-1/C, mandays chart of Roshan Lal Ex. PW-1/D, mandays chart of Nek Chand Ex. PW-1/E and mandays chart of Om Prakash Ex. PW-1/F. He further stated that Nek Chand and Om Prakash are working at Check Post Dadeog and they were appointed on 02 wages after approval of the government and they cannot be removed from the service. As per record the petitioner was working since the year, 2005 to 2011 on seasonal basis as per the availability of work and other persons namely Leela Dass, Roshan Lal, Nek Ram and Om Prakash are working on bill basis. In cross-examination, he stated that Om Prakash and Nek Chand have been engaged as per the Court order. The work of the department is of seasonal nature and as per the availability of funds.

12. The respondent has examined one Shri Ramesh Chand, Range Forest Officer, Bhajji as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as stated in the reply. He also tendered in evidence the copy of mandays chart of petitioner Ex. RW-1/B. In cross-examination, he admitted that Nek Ram and Om Prakash are working under his range as casual workers. He further admitted that the petitioner was their daily wage worker since the year, 2005. He denied that the petitioner was orally terminated by the department without giving any notice. He admitted that the petitioner had worked for more than 240 days in the year, 2006.

13. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof, it has become clear that initially the petitioner was engaged as casual labourer w.e.f. 1.1.2005 and worked as such till the year 2011 as is evident from the mandays chart Ex. RW-1/B. The perusal of the mandays chart Ex. RW-1/B shows that in the year, 2005, the petitioner had worked for 202 days, 303 days in the year, 2006, 186 days in 2007, 232 days in 2008, 211 days in 2009, 215 days in 2010 and 100 days in the year, 2011. From the mandays chart Ex. RW-1/B, it is abundantly clear that the petitioner has completed 240 days only in the year, 2006 and has not completed 240 days in preceding twelve months prior to his termination. There is no material on record which could show that the petitioner has completed 240 working days in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 incase titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others*** , the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

14. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon'ble Supreme Court has held that:—

> ***"Incase workman claims to have worked for more than 10 years as daily wager. Apart from oral evidence workman has not produced any evidence to prove fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced: no co-worker was examined; muster roll produced by employer has not been contradicted. Workman has failed to discharge his burden that he was in employment for 240 days during preceding 12 months of date of termination of his service. Workman not entitled for protection of Section 25-F before his service was terminated."***

A bare perusal of the extract of the judgment re-produced, hereinabove, shows that the burden to prove completion of 240 days in preceding twelve months lies on the workman and this

burden is discharged on workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in twelve calendar months preceding his termination. From the perusal of mandays chart, Ex. RW-2/A, it is abundantly clear that the petitioner had not completed 240 working days in twelve calendar months preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner.

15. The learned counsel of the petitioner further contended that at the time of the termination of the petitioner, the respondent had retained his juniors who are still working and besides this even fresh persons have been engaged by the respondent as such the respondent had violated the principles of "last come first go". However, no satisfactory evidence has been led by the petitioner to prove that the persons junior to him have been retained and fresh persons have been engaged. From the perusal of mandays charts of Shri Nek Chand Ex. PW-2/A and Shri Om Prakash Ex. PW-2/B, it cannot be said that S/Shri Nek Chand and Om Prakash are juniors to the petitioner as the perusal of their mandays chart goes to show that they were also engaged in Jan., 2005 when the petitioner was initially engaged. Moreover, it has been admitted in crossexamination by PW-2 that Om Prakash and Nek Chand have been engaged as per the Courts orders. From the perusal of mandays charts of S/Shri Leela Dass Ex. PW-2/C, Roshan Lal Ex. PW-2/D, Nek Ram Ex. PW-2/E and Om Prakash Ex. PW-2/F, it has become clear that they have been engaged on bill basis w.e.f. 2012 for seasonal work when the work and funds are available. No other evidence has been led by the petitioner in this respect. Hence, in the absence of any cogent and satisfactory evidence on record, the case of the petitioner does not fall under section 25-G and 25-H of the Act.

16. Thus, in view of the law laid down (supra) and my foregoing discussion, I have no hesitation in holding that the termination of the services of the petitioner during the year, 2011 by the respondent is not illegal and unjustified. Accordingly, issue no.1 is decided in favour of the respondent and against the petitioner.

Issue no. 2.

17. Since, the petitioner has failed to prove issue no.1 above, this issue becomes redundant.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 3, the claim of the petitioner fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioner. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 31st day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Ref no. 09 of 2015.

Instituted on 17.3.2015.

Decided on 31.3.2017.

Rukam Ram S/o Shri Salig Ram R/o Village Soma, P.O Arsu, Tehsil Nirmand, District Kullu, HP. *...Petitioner.*

VS.

The Divisional Forest Officer, Anni Forest Division Luhri, Tehsil Ani, District Kullu, HP. *...Respondent.*

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri Vishal Panwar, Advocate.

For respondent : Ms. Reena Chauhan, Dy. DA.

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"Whether termination of the services of Shri Rukam Ram S/o Shri Salig Ram R/o Village Soma, P.O Arsu, Tehsil Nirmand District Kullu, HP during the year, 2010 by the Divisional Forest Officer, Anni Forest Division, Luhri, Tehsil Ani, District Kullu HP without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back-wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"

2. In nutshell the case of the petitioner is that initially he was engaged as daily wager by the respondent at Arsu nursery in the year, 2004 on a daily wages of ₹ 120/- per day and he discharged his duties to the satisfaction of his superiors and completed 240 days in each calendar year. It is further asserted that the respondent department used to mark artificial breaks of the petitioner on some occasion and during this time, the respondent used to give daily wages @ ₹ 170/- per day. The services of the petitioner were terminated w.e.f. 5.3.2013 orally and then he raised the Industrial Dispute as his services had been terminated without following the relevant provisions of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is also asserted that in the department there are more than 100 workers working as daily wagers and since the department has the strength of more than 100 workers in their employment as such the provisions of section 25-N of the Act would be attracted but the respondent had failed to comply with the provisions of section 25-N of the Act before terminating the services of the petitioner. Even, the respondent had also violated the provisions of sections 25-G and 25-H of the Act by engaging the fresh persons namely Shri Dut Ram whereas the claim of the petitioner for the post of daily wager had been ignored. Against this back-drop a prayer has been made that the respondent be directed to re-instate the petitioner in service along-with all consequential benefits including back-wages.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections qua maintainability, that the petitioner had failed to complete 240 days in any calendar year, that the forest department is not an industry etc. On merits, it has been denied

that the petitioner was engaged as daily wager by the respondent in the forest department at Arsu nursery in the year, 2004 on daily wages @ ₹ 120/- per day. However, it is asserted that the petitioner was engaged as casual labourer @ ₹ 70/- per day for plantation work in Suma UPF during 2005-06 w.e.f. 21.12.2005 to 1.1.2006 to do the seasonal work. It is denied that the department used to mark the artificial breaks of the petitioner on some occasion. It is asserted that the petitioner had never completed 240 days in any calendar year and even the petitioner had worked as contractor on schedule rates fixed by the department from time to time and even the petitioner had been leaving the work at his own and the department never terminated his services on 5.3.2013. It is further asserted that the department neither engaged any junior persons nor there is any work for execution with the respondent. Since, the petitioner had been working occasionally and seasonally with the department, hence, the question of his termination does not arise and even he had been abandoning the work himself at his own, therefore, there was no necessity to issue any notice or to pay any compensation to him and even at this stage the department has no work which can be assigned to the petitioner. Shri Dut Ram also worked as contractor with the respondent to execute the field works on schedule rates. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. On the pleadings of the parties, the following issues were framed on 29.4.2016.

1. Whether the termination of the services of the petitioner during 2010 by the respondent is illegal and unjustified as alleged? ...*OPP.*

2. If issue no.1 is proved in affirmative, to what relief of service benefits the petitioner is entitled? ...*OPP.*

3. Whether the petition is not maintainable as alleged? ...*OPR.*

4. Relief.

6. I have heard the learned counsel for the petitioner and learned Dy. DA for respondent and have also gone through the record of the case carefully.

7. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1 No.

Issue no.2 Becomes redundant.

Issue no.3 No.

Relief. Reference answered in favour of the respondent and against the petitioner per operative part of award.

Reasons for findings

Issues no. 1.

8. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondent illegally without serving him any notice as required under

section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the junior persons to the petitioner are still working with the respondent department and fresh workers have been engaged.

9. On the other hand, Ld. Dy. DA for the respondent contended that the services of the petitioner had been engaged as casual seasonal labourer subject to the availability of work and funds. She further contended that since the petitioner had not completed 240 days in any calendar year and no junior to him had been retained by the respondent, hence, he is not entitled to any relief.

10. To prove issue no.1, the petitioner stepped into the witness box as PW-1 to depose that he was engaged as daily wage beldar by the respondent at Arsu nursery in the month of Feb., 2004 and he was getting ₹ 120/- per day as daily wages. He worked till 5.3.2013 on which date his services were orally terminated by the respondent without giving any notice. He had worked in plantation of nursery, chowkidari of nursery during his service tenure. He had also worked at Pali beat, Beeni beat and Tharo beat and all these beats falls under Arsu Division. After his termination, he requested the respondent for reinstatement but of no avail. He had worked for more than 240 days in each calendar year and after his termination, the respondent had engaged new person Shri Dut Ram in his place and retained many other juniors to him. In crossexamination, he denied that he had not completed 240 working days in any year and that he was engaged as casual labour w.e.f. 21.12.2005 to 1.1.2006 and he was getting ₹ 70/- per day for plantation work. He further denied that he had not worked during the year, 2004 and that the work for which he was engaged was seasonal in nature. He also denied that he had not worked w.e.f. March 2010 to November, 2010 and Feb., 2011 to November, 2012 as there was no work. He denied that he had left the work at his own and the respondent never terminated his services. He further denied that no junior to him had been engaged by the respondent and that Shri Dut Ram was not engaged after his termination in his place.

11. The respondent examined two RWs. Shri Kishori Lal, Range Forest Officer, Arsu appeared into the witness box as RW-1 who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence mandays cahrt Ex. RW-1/B, the details of work done and payment made to the petitioner Ex. RW-1/C to Ex. RW-1/K and copy of muster roll Ex. RW-1/L. In cross-examination, he denied that the petitioner was engaged as daily wager in the year, 2004 at Arsu nursery. He further denied that the petitioner had worked as daily wager–cum-chowkidar at Arsu nursery w.e.f. 2004 to 5.3.2013 and that his services had been orally terminated on 5.3.2013. He also denied that the petitioner had completed 240 days in each calendar year prior to his termination. He admitted that the muster roll Ex. RW-1/L does not bear the signature of the petitioner against column no. 11. He further admitted that the signatures of the petitioner had been taken only against the payment made to him. He denied that the muster roll Ex. RW-1/L had been fabricated by the department and prepared as per their own choice. He admitted that no muster roll is available from the period w.e.f. the year, 2011 to 2013. He further admitted that the petitioner had worked upto March, 2013. He denied that after the termination of the petitioner, one Shri Dut Ram was engaged in his place.

12. RW-2 Shri Kanwar Singh, Forest Guard, Arsu also tendered in evidence his affidavit Ex. RW-2/A wherein he stated that the petitioner worked as casual labourer on availability of work and funds w.e.f. 21.12.2005 to 30.1.2008 on muster roll basis and from December, 2012 to March, 2013, he worked on bill basis with department and the work provided to him was of seasonal nature. In cross-examination, he denied that the petitioner was engaged as a daily wager in the year, 2004 at Arsu nursery and that he had worked continuously till March, 2013 and had completed 240 days in each calendar year. He admitted that no notice was issued to the petitioner. He denied that after the termination of the petitioner one Shri Dut Ram was engaged in his place.

13. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof, it has become clear that initially the petitioner was engaged as casual labourer in the month of December, 2005 as is evident from the mandays chart Ex. RW-1/B. The perusal of the mandays chart shows that in the year, 2005, the petitioner had worked for 11 days, 29 days in the year, 2006, 9 days in 2007, ten days in 2008 and 29 days in the year, 2010. From the mandays chart Ex. RW-1/B, it is abundantly clear that the petitioner has not completed 240 days in any calendar year and in preceding twelve months prior to his termination. There is no material on record which could show that the petitioner has completed 240 working days in any calendar year and in twelve calendar months preceding his termination. In ***2009 (120) FLR 1007 incase titled as Relip Nagarpalika Vs. Babuji Gabhaji Thakore and others*** , the Hon'ble Supreme Court has held as under:

> ***"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."***

14. In ***AIR 2006 S.C. 110 case titled as Surindernagar District Panchyat V/s Dayabhai Amar Singh, the*** Hon'ble Supreme Court has held that:—

> ***"Incase workman claims to have worked for more than 10 years as daily wager. Apart from oral evidence workman has not produced any evidence to prove fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced: no co-worker was examined; muster roll produced by employer has not been contradicted. Workman has failed to discharge his burden that he was in employment for 240 days during preceding 12 months of date of termination of his service. Workman not entitled for protection of Section 25-F before his service was terminated."***

A bare perusal of the extract of the judgment re-produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged on workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in any calendar year and in twelve calendar months preceding his termination. From the perusal of mandays chart, Ex. RW- 1/B, it is abundantly clear that the petitioner had not completed 240 working days in any calendar year and in twelve calendar months preceding his termination. Hence, the case of the petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner.

15. The learned counsel of the petitioner further contended that at the time of the termination of the petitioner, the respondent had retained his junior Shri Dut Ram who is still working and besides this even fresh persons have been engaged by the respondent as such the respondent had violated the principles of "last come first go". However, except for the bald statement of the petitioner no evidence has been led by him to prove that the persons junior to him have been retained and fresh persons have been engaged by the respondent. Hence, in the absence of any cogent and satisfactory evidence on record, the case of the petitioner does not fall under section 25-G and 25-H of the Act.

16. Thus, in view of the law laid down (supra) and my foregoing discussion, I have no hesitation in holding that the termination of the services of the petitioner during the year, 2010 by the respondent is not illegal and unjustified. Accordingly, issue no.1 is decided in favour of the respondent and against the petitioner.

Issue no. 2.

17. Since, the petitioner has failed to prove issue no.1 above, this issue becomes redundant.

Issue No. 3.

18. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication and I find nothing wrong with this petition which is perfectly maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 3, the claim of the petitioner fails and is hereby dismissed and as such the reference is ordered to be answered in favour of the respondent and against the petitioner. Let a copy of this award be sent to the appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 31st day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA

Ref no. 28 of 2012.

Instituted on 14.6.2012.

Decided on 31.3.2017.

Gauri Pratap Shankar S/o Shri R.D Shankar R/o Village Sanahu, P.O Deola via Mashobra, Shimla-7, HP. *...Petitioner.*

VS.

M/s Gables India Pvt., India Ltd., Mashobra, Shimla through its General Manager.
...Respondent.

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri Vikas Shyam, Advocate.

For respondent : Shri Abhishek Sood, Advcoate.

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"***What amount of back wages for the period 20.5.2004 to 12.5.2008 as per statement of Shri Gauri Pratap Shasnkar S/o Shri R.D Shankar Village Sasnahu, P.O Deola via mashobra Shimla-7 is he entitled from the management of M/s Gables India Pvt. Ltd., Mashobra Shimla as per award dated 19.5.2004 passed by the Ld. Labour Court Industrial Tribunal Shimla in reference no. 230 of 1998, titled Gauri Pratap Shankar Vs. The Management of M/s Gables India Pvt. Ltd., mashobra, Shimla which was published in the Rajpatra on 14.8.2004?"***

2. Briefly, the case of the petitioner is that he had been appointed as Typist by the respondent on 12.12.1995 on fixed salary of ` 350 per month and he had been discharging his duties with utmost sincerity and on 3.4.1997, he had applied for 27 days leave which had been duly sanctioned by the competent authority but later on vide letter dated 30.4.1997, his services were terminated w.e.f. 10.4.1995. Thereafter, the petitioner had assailed his termination before this Court and this Court vide its judgment dated 19.5.2004 allowed the petition and directed the respondent to reinstate the petitioner with continuity, seniority and back-wages @ 25% with cost and in compliance of aforesaid award, he had joined his duties at Mashobra on 18.11.2008 and received an amount of ₹39813/- on account of back-wages and he had not been paid the wages from 20.5.2004 to 12.5.2008. It is further stated that the petitioner had gone to the respondent along-with the copy of award on 9.8.2004 but the joining had not been given to him for the reason best known to the respondent and thereafter, he approached the Labour Inspector to seek redressal of his grievances and on 7.11.2006, he received one letter accompanying cheque in the sum of ₹ 38819/- wherein he had been asked to join his duties at Chandigarh within 15 days and thereafter he had gone to the respondent to join his duties but he was not allowed, hence, the petitioner is entitled to full back wages w.e.f. 20.5.2004 to 12.5.2008. It is also stated that the respondent had not calculated the wages of the petitioner as per terms of the award and he is entitled for the following amount from the respondent:

a.	December 1995 to March, 1997, total amount works out:	₹ 7728/-.
b.	W.e.f 1.4.1997 to 19.5.2004 @ 25% works out	₹ 42820/-.
c.	Interest w.e.f. 1.4.1997 to 7.11.2006 works out	₹ 18626/-
d.	Total amount works out ` 61446/- and after deducting ₹ 39813/- the remaining amount works out	₹ 21,633/-
e.	The petitioner is also entitled for the amount w.e.f. 20.5.2004 to 12.5.2008 which works out	₹ 16800/-.

Against this back-drop it has been prayed that the respondent be directed to re-engage the services of the petitioner and also directed to pay full back-wages as calculated above along-with interest @ 18% and also to pay the compensation in the sum of ₹ 20,000/- for unnecessarily botheration.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken that the claim petition is neither competent nor maintainable, estopple, barred by limitation and that the reference forwarded by the Labour Commissioner is illegal as the award has been complied with by the respondent in letter and spirit. On merits, it has been asserted that the award stood complied with by the respondent but the petitioner has been trying to wriggle out the award as the back-wages as awarded vide award dated 19.5.2004, stood paid to the petitioner and there is no amount due to him on account of backwages. It is denied that the back-wages of the petitioner are much more than what has been paid by the respondent. It is asserted that there is no question of paying any back-wages from 20.5.2004 to

12.5.2008 to the petitioner as during that period, he willfully and intentionally did not join his duties as requested by the management as per letter dated 7.11.2006. It is further asserted that the petitioner was working with M/s Sai Automobiles Sanjauli, Shimla-6 from 1.9.2004 till 28.2.2006 as per letter dated 17.3.2008 and as such he cannot claim back-wages once he had worked with another organization. The petitioner never came to the respondent after the passing of the award and he had not joined at Mashobra at any point of time and since the work at Mashobra had been transferred to M/s Mohindra Holiday Resorts Pvt., Ltd. and the construction work had also almost come to an end, therefore, there was no requirement of any personnel at Mashobra, hence, the petitioner was asked to join at Chandigarh in order to implement the award. The respondent prayed or the dismissal of the claim petition.

4. Rejoinder not filed. On the pleadings of the parties, the following issues were framed on 1.3.2014.

1. Whether the petitioner is entitled to claim back-wages w.e.f. 20.5.2004 to 12.5.2008 as alleged? ? ...*OPP.*

2. Whether the petitioner is also entitled to claim the amounts as mentioned in para 4 of the claim petition as alleged? ...*OPP.*

3. Whether the petitioner was not allowed to join his duties as alleged? If so, its effect? ...*OPR.*

4. Whether this petition is not legally maintainable as alleged? ...*OPR.*

5. Whether the respondent has paid the entire amount as per the award dated 19.5.2004, passed in reference no. 230/1998 by way of full and final payment by cheque no. 001261 dated 7.11.2006 for a sum of ` 39813/- as alleged? ...*OPR.*

6. Whether the petitioner despite having been afforded opportunities had deliberately chosen not to work for the respondent as alleged? ...*OPR.*

7. Relief.

5. I have heard the learned counsel for the parties and have also gone through the record of the case carefully.

6. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue no.1 Entitled for the wages w.e.f. 20.5.2004 to 31.8.2004 and thereafter w.e.f. 1.3.2006 to 12.5.2008.

Issue no.2 Decided accordingly.

Issue no.3 Yes.

Issue no.4 No.

Issue no.5 Decided accordingly.

Issue no.6 No.

Relief. Reference answered in favour of the petitioner and against the respondent per operative part of award.

Reasons for findings

Issues no.1, 3 & 6.

7. Being interlinked and correlated all the aforesaid issues are taken up and discussed together for decision.

8. To prove issue no.1, the petitioner stepped into the witness box as PW-1 and tendered in evidence his affidavit Ex. PW-1/A wherein he reiterated almost all the averments as stated in the claim petition. He also tendered in evidence the copy of award Ex. PW-1/B, letter dated 9.6.2011 Ex. PW-1/C, receipt Ex. PW-1/D, letter dated 14.4.2011 Ex. PW-1/E and letters dated 9.6.2011 Ex. PW-1/F and dated 11.7.2011 Ex. PW-1/G. In cross-examination, he stated that he wrote a letter dated 21.11.2006 Ex. RX to Hotel Gables which was replied by the respondent vide letter dated 28.11.2006 Ex. RX-1. He admitted that vide letter dated 7.11.2006, he had been asked to join at Chandigarh but he had not joined there. He admitted that letter dated 12.1.2007 Ex. RX-2 had been written by him to the management. He further admitted that he was directed by the Labour Commissioner to join at Hotel Gables Shimla and that he had joined on 13.5.2008 in the Hotel vide joining report Ex. RX-3. He also admitted that letters Ex. RX-4 to Ex. RX-6 have been written by him. He admitted that thereafter he had been transferred to Baddi but he had not joined there. He denied that he had left the job at his own on 24.4.2009. He admitted that he had received letter Ex. RX-7. He denied that award Ex. PW-1/B has been implemented by the respondent. He further denied that he had worked with M/s Sai Automobiles Sanjauli w.e.f. 1.9.2004 till 28.2.2006 and also worked with M/s Whistling Pine Baddi. He denied that he is not entitled to back-wages and that he had filed a false claim. He admitted that letters Ex. PX-8, to Ex. PX-10 had been written by him to the Hotel Management. He denied that he used to proceed on leave without permission.

9. On the other hand, the respondent has examined four RWs. RW-1 Shri Avinash Kumar, Senior Assistant from the office of EPF has deposed that as per form-9, the petitioner joined M/s Sai Auto Mobiles Sanjauli, Shimla on 1.9.2004 vide Ex. RW-1/A and certificate Ex. RW-1/B, had been issued by their office. In cross-examination, he denied that Ex. RW-1/A and Ex. RW-1/B, are incorrect. He further denied that the petitioner was never engaged by M/s Sai Auto Mobiles Sanjauli, Shimla.

10. RW-2 Shri Shekhar Bhoral, Manager, HR Club Mahindra has deposed that M/s Gables India (p) Ltd., entered into a leave and license agreement with M/s Mahindra Holidays and Resorts India Ltd., on 13.4.2009 and the premises known as hotel Gables Mashobra was licensed to M/s Mahindra Holidays and Resorts India Ltd. No staff of Hotel Gables was transferred to M/s Mashindra Holidays and Resorts India Ltd. In cross-examination, he denied that the staff of hotel Gables Mashobra continued in their establishment till date.

11. RW-3 Shri Gurdayal Singh, Supervisor Gables India, (P) Ltd., Mashobra has deposed that no employee of Hotel Gables was transferred to M/s Mahindra holidays and Resorts India Ltd. The petitioner used to remain absent from duty and his behavior towards his seniors was not satisfactory and he was transferred by the management to Baddi but he did not join there. In cross-examination, he denied that he is not the employee of Gables India. He further denied that the petitioner was doing his duties sincerely and that the staff of Hotel Gables continued with Club Mahindra. He also denied that the management of Gables India used to harass the petitioner.

12. RW-4 Shri Tek Chand, Admin Executive has tendered in evidence his affidavit Ex. RW-4/A wherein he reiterated almost all the averments as stated in the reply. He also tendered in evidence, the copy of resolution dated 27.7.2016 Ex. RW-4/B, copy of detail amount calculated as per award dated 19.5.2004 Ex. RW-4/C, letter dated 10.11.2006 Ex. RW-4/D, letter dated 27.12.2006 Ex. RW-4/E, letter dated 8.1.2007 Ex. RW-4/F, letter dated 7.11.2006 Ex. RW-4/G, letter dated 12.10.2007 Ex. RW-4/H, letter dated 8.4.2008 Ex. RW-4/J, letter dated 2.5.2008 Ex. RW-4/K, letter dated 9.1.2009 Ex. RW-4/L, office memo dated 27.2.2009 Ex. RW-4/M, letter posted on 6.5.2009 Ex. RW-4/N, letter dated 21.4.2009 Ex. RW-4/O, letter dated 7.4.2011 Ex. RW-4/P and letter dated 14.4.2011 Ex. RW-4/Q. In cross-examination, he denied that the employees of Gables (India) Private Ltd., are still working in the Hotel i.e Club Mahindra at Mashobra. He admitted that the Labour Court had passed an award Ex. PW-1/B in favour of the petitioner. He denied that the aforesaid award has not been implemented by the respondent. He further denied that the entire wages as per award Ex. PW-1/B have not been paid to the petitioner by the respondent. He also denied that the respondent had intentionally transferred the petitioner to Chandigarh and that as per award Ex. PW-1/B, the petitioner was to be posted at Shimla. He denied that the petitioner is entitled to be re-instated in service with seniority and continuity alongwith back-wages. He further denied that no letter has been received by the petitioner. He also denied that no lease deed has been executed with Club Mahindra.

13. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that an award Ex. PW-1/B was passed by this Court in favour of the petitioner and against the respondent on 19.5.2004 wherein the petitioner was ordered to be reinstated in service with continuity, seniority and back-wages @ 25% with costs which was assessed at ` 1,000/-. It is also not in dispute that the petitioner received an amount of ₹ 39,813/- by way of cheque dated 7.11.2006 from the respondent vide letter Ex. RX. In the aforesaid letter Ex. RX, the petitioner has stated that he had received the aforesaid cheque as a part payment and the same was not final. He further stated in the aforesaid letter that as per the award Ex. RW-1/B, he visited the respondent for joining his duties on 20.11.2006 but he was not allowed to join. It is also not in dispute that vide letter dated 7.11.2006 Ex. RW-4/G, the petitioner was asked to resume the duties at Head office Chandigarh by the respondent and this fact has been admitted by the petitioner in cross-examination, that he was directed by the respondent management vide letter dated 7.11.2006 to join at Chandigarh office but he did not join. The perusal of the award shows that the petitioner was ordered to be reinstated in service along-with seniority, continuity and back-wages @ 25% by the respondent i.e Hotel Gables Pvt. Ltd., Mashobra and there were no directions to the respondent that the petitioner be transferred to Chandigarh. Therefore, it has become clear that the petitioner was not allowed to join his duties at Hotel Gables Pvt. Ltd., Mashobra by the respondent. It has been admitted by the petitioner in cross-examination, that on 12.5.2008, the Labour Commissioner had directed the petitioner to join at Hotel Gables Shimla and on 13.5.2008 he joined at Hotel Gabels Shimla vide joining report Ex. RX-3. In 2011 LLR 918, titled as Panipat Co-operative Sugar Mills Ltd., Vs. Presiding Officer Labour Court, Ambala and others, , it has been held that when the person was willing to work but he was not allowed to work he would be treated as if he had worked. The relevant portion of the aforesaid judgment reads as under:

> **"2…….if they were entitled to be taken back with continuity of service, the denial of the wages shall not be merely done unless there were definite circumstances that would deny to a workman the wages on the basis of "no work, no pay". However, if the denial was not justified, there is no reason why the employer must be reawarded with a benefit of not paying the workmen the wages which they were entitled to. It would be perfectly legitimate to make exception to situation when the person was willing to work but was not allowed to work, to be treated 'as if he had worked' as noted by the Hon'ble Supreme Court in Commissioner Karnataka Housing Board Vs. C. Muddaiah, (2007) 7 SCC 689: 2007 (115) FLR 16 (Sum)."**

14. It has further been held in 2011 LLR 405 titled as Nagar Palika Nigam, Khandwa Vs. Tulsiram and another, the Hon'ble High Court of Madhya Pradesh that allowing wages by the Labour Court for the period from the date of reinstatement directed by the Labour Court and actual reinstatement will not be illegal. The relevant portion of the aforesaid judgment reads as under:

> **"8. In the case at hand, admittedly an award of reinstatement with back-wages was passed in favour of respondent workman. The said orders of reinstatement with back-wages were subsequently modified to the extent of reinstatement only. Thus right accrued in favour of respective workmen for the wages as per the award dated 2.9.2002.**
>
> **9. The record further reveals that each of the workmen were reinstated much after the date of award which ipso facto, in our considered opinion, will not deprive them the wages of the post on which they are reinstated from the date of award and as per the award."**

15. Thus, keeping in view the law laid down (supra), it was incumbent upon the respondent to have implemented the order of reinstatement of the petitioner at Hotel Gables Shimla but he was only allowed to join on 13.5.2008 that too on the intervention of the Labour Commissioner as is evident from the joining report Ex. RX-3. The aforesaid fact would show that the respondent delayed the matter and the award was not implemented till 12.5.2008. There has been intentional delay on behalf of respondent to implement the award thereby making it clear that the respondent never wanted to reinstate the petitioner and pay wages to him. Since, the respondent had not re-instated the petitioner as per award Ex. PW-1/B, passed by this Court, till 12.5.2008, therefore, in view of law laid down (supra) the petitioner otherwise would have been entitled for the wages for the period w.e.f. 20.5.2004 to 12.5.2008. However, in order to claim wages for the aforesaid period, it was for the petitioner to prove that during the aforesaid period, he was not gainfully employed as held by the Hon'ble Supreme Court **in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that :

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……..."

However, it has come on record that the petitioner had worked with M/s Sai Automobiles Sanjauli Shimla w.e.f. 1.9.2004 till 28.2.2006 as per the certificates Ex. RW-1/A and Ex. RW-1/B. Therefore, as the petitioner was gainfully employed with M/s Sai Automobiles Sanjauli Shimla during the aforesaid period, the petitioner is not entitled to claim any wages for this period from the respondent. Hence, the petitioner is only entitled for the wages w.e.f. 20.5.2004 to 31.8.2004 and thereafter w.e.f. 1.3.2006 to 12.5.2008. Hence, all the aforesaid issues are decided accordingly.

Issues no. 2 & 5.

16. The petitioner has claimed the amounts as mentioned in para four of the claim petition and the respondent's case is that the entire amount as per the award dated 19.5.2004 passed in reference no. 230/1998 Ex. PW-1/B has been paid. However, as per the terms of the reference, these points of dispute have not been referred for adjudication by the appropriate government as such this Court cannot adjudicate upon the aforesaid points of dispute and cannot go beyond the terms of reference. It is a settled law that the jurisdiction of the Industrial Court to decide the industrial disputes is determined by the terms of reference. Where in an order referring an industrial dispute to a Tribunal under section 10 (1) of the Act, the appropriate government has specified the

points of dispute for adjudication, the Tribunal shall confine its adjudication to those points and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of dispute referred to it but must confine its adjudication to the points specifically mentioned and anything which is incidental thereto. The jurisdiction of the Tribunal is circumscribed by the terms of reference and not by the pleadings of the parties. In **(2004) 10 SCC 460, Mukand Ltd Vs. Mukand Staff and Officers Association**, the Hon'ble Supreme Court has held that the Labour Court is the creature of the reference and cannot travel beyond the terms of reference. The relevant portion of the aforesaid judgment is reproduced as under:

> "36. We, therefore, hold that the reference is limited to the dispute between the Company and the Workmen employed by them and that the Tribunal, being the creature of the Reference, cannot adjudicate matters not within the purview of the dispute actually referred to it by the order of Reference. In the present case also as observed earlier, as per the terms of reference the only point of dispute between the parties was as to what amount of back-wages for the period from 20.5.2004 to 12.5.2008, the petitioner was entitled to from the respondent. Therefore, in view of the law laid down by the Hon'ble Supreme Court, this Court has no jurisdiction to go beyond the terms of reference and inquire into the question as to whether the petitioner is entitled to claim the amount as mentioned in para four of the claim petition and whether the respondent has paid the entire amount as per the award dated 19.5.2004 Ex. PW-1/B. Hence, all the aforesaid issues are decided accordingly.

Issue No. 4.

17. In support of this issue, no evidence has been led by the respondent in order to show that as to how this petition is not maintainable especially when a reference has been made by the appropriate government to this Court for adjudication Accordingly, by holding it to be maintainable this issue is decided in favour of the petitioner and against the respondent.

Relief.

As a sequel to my above discussion and findings on issues no.1 to 6, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is held entitled for the wages w.e.f. 20.5.2004 to 31.8.2004 and thereafter w.e.f. 1.3.2006 to 12.5.2008, as such the reference is answered partly in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 31st Day of March, 2017.

(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

8.4.2017

Present: Petitioner in person.
Shri Tarun Singh, AR for respondent.

With the efforts of Lok Adalat, the matter has been settled between the parties. It has been stated by Shri Tarun Singh, AR for the respondent management that the respondent is ready to pay a sum of Rs. 50,000/- to the petitioner on account of full and final settlement of the claim arising

out of reference no. 13 of 2017 and the respondent management has paid Rs. 37,755/- (Rs. Thirty Seven Thousand Seven Hundred and Fifty Five Only) through cheque no. 021673 dated 8.4.2017 drawn on ICICI Bank Paonta Sahib to the petitioner in the Court today and remaining amount i.e Rs. 12,245/- (Rs. Twelve Thousand Two Hundred Forty Five only) shall be paid to the petitioner within a period of ten days from today failing which the same shall carry interest @ 9% per annum. To this effect his statement recorded separately.

Vide separate statement the petitioner has accepted to receive a sum of Rs. 50,000/- (Rs. Fifty Thousand only) as full and final settlement of his claim arising out of reference no. 13/2017 and he further stated that thereafter he shall have no claim against the respondent management. Therefore, the reference is disposed of in view of the statements of the parties, which shall form a part of this award/order. Let a copy of this award/order be sent to appropriate government for publication in the official gazette. File, after completion, be consigned to records.

Announced:
8.4.2017

(Dr. Sushma Kaushal) (Dr. M.L. Kaushal) (Sushil Kukreja)
Member. *Member.* *Chairman*
LokAdalat

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT, SHIMLA, DISTRICT SHIMLA, H.P.

Reference No :- 24/2016.

Date of Institution :-23.03.2015

Date of Decision :- 31.03.2017.

In the matter of :-

Mulkh Raj s/o late Shri Banta Ram, r/o village Malikpur, P.O. Malikpur, Tehsil & District Ropar, Punjab. *.....Petitioner*

Versus

M/s Indofarm Eqipments Ltd. (Casting Division), village Thana Baddi, District Solan, HP.
.....Respondent.

Reference under Section 10 of the Industrial Disputes Act, 1947

Counsel .—

For the petitioner : Shri A.K. Sharma, Authorized Representative.

For the respondent : Shri H.R. Thakur, Advocate.

AWARD

The following reference has been sent by the appropriate Government for adjudication.

"Whether termination of the services of Sh. Mulkh Raj s/o Shri Banta Ram, village-New Malikpur, P.O. Malikpur, Tehsil & District Ropar, Punjab by the Managing Director, M/s Indo Farm Ltd. (Casting Division) Industrial Park, Phase-I, Village Thana Baddi, District Solan, HP without complying with the provisions of the Industrial Disputes Act, 1947 as alleged by the workman vide demand notice dated-14.10.2014 (Copy-enclosed), is legal and justified? If not, what amount of bank wages, seniority, past services benefits and compensation the above ex-worker is entitled to from the above employer?"

2. Briefly, stated the case of the petitioner is that he was employed with the respondent as an electrician w.e.f. 02.02.2010 and was drawing last wages @ ₹ 11,984/- per month. That the petitioner, has completed more than 240 days continuously before his illegal termination of service. That the petitioner met with an accident during the course of employment and got the injury on his left foot on 16.12.2012 and he remained under medical treatment. He was declared fit to join duty, but the respondent did not allow him to join the duty. The services of the petitioner were deemed to be terminated on 14.10.2014 arbitrarily in an unlawful manner and without complying with the provisions of Section 25 F of the Industrial Disputes Act (here-in-after referred to as the "Act"). That the petitioner raised a demand notice, but no settlement could be arrived during the conciliation proceedings. Against this background, a prayer has been made for his reappointment with all consequential benefits including back wages.

3. By filing reply, the respondent had contested the claim of the petitioner wherein preliminary objections have been taken that the services of the petitioner were never terminated, rather the petitioner himself is absenting from duty, that the petitioner has not completed 240 days prior to the date of his alleged termination, that the claim of the petitioner is not maintainable. On merits, it has been admitted that the petitioner met with an accident on 16.12.2012 and ESI was making him payment during the treatment period. He remained on medical leave or was under treatment upto 09.10.2013. Thereafter, he has not sent any medical leave or remained under treatment in the ESI hosptial. The medical Board constituted under ESI Corporation opined zero percent disability. That from 09.10.2013, the petitioner is absenting from duty without any reason or any intimation. The services of the petitioner had never been terminated by the respondent and he has not submitted medical fitness certificate till today. On the basis of these averments, the respondent has prayed for dismissal of the application.

4. The petitioner filed a rejoinder wherein he controverted the assertions made in the reply and reiterated the contents of the application.

5. Before I proceed further, it is important to mention here that earlier the petitioner had filed an application under Section 2A of the Act which was registered as Application No.13/2015. The reply was filed by the respondent, issues were framed and case was fixed for evidence of the petitioner. However, thereafter, the present reference has been received by this court from the appropriate government and vide order dated 28.04.2016, the reference was registered as Reference No.24/2016 and the application filed under Section 2A of the Act, reply and all the documents were ordered to be placed in the present reference case No.24/2016.

6. Pleadings of the parties gave rise to the following issues which were framed for adjudication on 03.03.2016:—

1 Whether the termination of the services of the petitioner w.e.f. 14.10.2014 by the respondent without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified, as alleged? ...*OPP*.

2 If issue no.1 is proved in affirmative, to what relief of service benefits the petitioner is entitled to? ...*OPP.*

3 Whether the petition is not maintainable, as alleged? ...*OPR.*

4. Relief.

7. Besides having heard the learned AR for the petitioner and ld counsel for the respondent, I have also gone through the record of the case carefully. For the reasons to be recorded hereinafter, the findings on the aforesaid issues are as follows:—

Issue No.1 Yes.

Issue No.2 Entitled to reinstatement with seniority and continuity but without back-wages.

Issue No.3 No.

Relief. Reference partly answered in favour of the petitioner and against the respondent per operative part of award.

Reasons for findings

Issue No. 1.

8. Learned counsel for the petitioner contended that services of the petitioner had been terminated illegally despite the fact that he had completed more than 240 days in a calendar year. He further contended that the petitioner remained under medical treatment and he was declared fit to join the duty, but the respondent did not allow him to join duty.

9. On the other hand, learned counsel for the respondent contended that the services of the petitioner had never been terminated by the respondent, rather the petitioner himself is absenting from duty. He further contended that petitioner has not completed 240 days prior to the date of his alleged termination.

10. The petitioner himself stepped into the witness box as PW-1 and tendered in evidence his affidavit Ex.PW-1/A wherein he reiterated the almost all the averments made by him in the petition. He also tendered in evidence copy of appointment letter Ex.PW-1/B, copy of OPD slip of ESI Hosptial Baddi Ex.PW-1/C, copy of OPD of PGI Chandigarh Ex.PW-1/D, copy of OPD of Max City Hosptial Ex.PW-1/E and bank statement Ex.PW-1/F. In cross-examination, he denied that after getting fitness certificate, he had not visited the factory of the respondent to join the duties. He also denied that he had never completed 240 days in a year.

11. On the other hand, Shri Chattar Singh, H.R. Manager appeared in the witness box as RW-1 who stated that the petitioner had joined as Electrician with the respondent in the year 2010 and in December 2012, he met with an accident. He further deposed that the petitioner remained under treatment at ESI Hospital at Baddi till October 2013 and thereafter, the Medical Board of ESI hospital had assessed his disability at 0%, but the petitioner never joined the duties by obtaining medical fitness certificate from ESI. He further deposed that the respondent never terminated the services of the petitioner. In cross-examination, he admitted that the petitioner joined with the respondent company on 02.02.2010 and he worked continuously upto 16.12.2012. He denied that Medical Board of ESI hospital has declared the petitioner medically fit on 04.09.2013.

12. I have heard ld counsel for the parties and also closely scrutinized the entire evidence on record and from the closer scrutiny thereof, it has become clear that petitioner joined as an Electrician with the respondent on 02.02.2010 vide appointment letter Ex.PW-1/B and he worked continuously till 16.12.2012 on which date he met with an accident during the course of employment and remained under treatment in ESI hospital. It is not disputed that ESI was making him the payment as provided under the ESI Act during the treatment period. It has also become clear from the record that the Medical Board of ESI examined the petitioner and opined his disability at zero percent. The case of the petitioner is that he submitted the fitness certificate before the respondent management on 23.10.2014, but the management did not allow him to join his duty and orally terminated his services. But, the case of the respondent is that the petitioner remained on medical leave upto 09.10.2013 and thereafter, he absented himself from duty without any reason or any intimation and his services were never terminated. However, from the perusal of the entire evidence on record, it is revealed that the petitioner remained under medical treatment and therefore, it cannot be said that the petitioner absented himself from duty without any reason. The absence of the petitioner from duty was on medical grounds as it has come on record that the petitioner met with an accident during the course of employment. It cannot be said that the petitioner remained absent without any reason and he had absented himself from duty with an intention not to join back. No evidence has been led by the respondent that the petitioner has absented himself from duty without any reason and he intended not to join the duties. From the evidence on record, it is clear that the petitioner remained absent from duty on medical grounds which was beyond his control. It has also been admitted by RW-1 in crossexamination that neither any notice has been issued nor any inquiry has been conducted against the petitioner for his absence from the duty. Therefore, in view of the facts and circumstances of the present case, it cannot be said that the petitioner has absented himself from duties without any sufficient cause, as such, the termination of the service of the petitioner cannot be said to be legal and justified.

13. Learned counsel for the petitioner next contended that the petitioner has completed more than 240 days continuously before his illegal termination of service and the services of the petitioner has been terminated without complying with the provisions of Section 25-F of the Act. It is not in dispute that the petitioner had worked continuously with the respondent w.e.f. 02.02.2010 upto 16.12.2012 and this fact has been admitted by RW-1 in cross-examination. It is also admitted fact that neither any notice was issued to the petitioner nor he was paid any compensation prior to his termination. Therefore, before terminating the service of the petitioner, it was incumbent upon the respondent to have complied with the provisions of Section 25-F of the Act which lay down certain conditions precedent to the retrenchment of a workman and requires the employer to comply with those conditions as per clauses (a) to (c) which are mandatory in nature. However, in the present case the perusal of the record shows that the respondent has not complied with the conditions of Section 25-F of the Act precedent to the retrenchment of the petitioner. **In (2015) 4 SCC 544, Mackinnon Mackenzie and Company Ltd., Vs. Mackinnon employees Union**, the Hon'ble Apex Court has held as under:

> "34. ……**The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F clauses (a) and (c) of the I.D. Act which are mandatory in law."**

14. In the present case also, it has become clear that respondent has not complied with clause (a) to (c) of Section 25-F of the Industrial Disputes Act. Hence, in view of the law cited supra and my forgoing discussion, I have no hesitation in holding that the termination of service of the petitioner by the respondent is violative of the provisions of Section 25-F of the Industrial Disputes Act. Thus, having regard to entire evidence on record and my forgoing observations, I have no hesitation in holding that the termination of the services of the petitioner w.e.f. 14.10.2014 by the respondent without complying with the provisions of the Act is illegal and unjustified. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 2.

15. Since, I have held under issue no.1 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is improper, illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

16. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the learned counsel for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited Vs. Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial backwages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals Vs. Prabhakant Shukla that** full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

17. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon'ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another Vs. S.C Sharma** that:

> "16. ……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

18. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Therefore, in view of the entire evidence, on record, coupled with the rulings (supra), I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue no.2 is partly decided in favour of the petitioner and against the respondent.

Issue No.3.

19. In support of this issue, no evidence has been led by the respondent. Therefore, in the absence of any evidence on record it cannot be said that the petition is not maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief.

20. As a sequel to my above discussion and findings on issues no.1 to 3, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced and signed in the open Court today on 31st day of March, 2017.

(SUSHIL KUKREJA)
Presiding Judge,
Industrial Tribunal-cum-Labour Court,
Shimla, District Shimla, HP.

Mulkh Raj *Versus* M/s Indofarm

31.03.2017

Present: None for *petitioner.*

Ms Sandeepna vice counsel to Shri, H.R. Thakur Advocate for respondent.

Vide separate order of even date, reference partly answered in favour of the petitioner and against the respondent. File after due completion be consigned to the record room.

Announced

31.03.2017

(SUSHIL KUKREJA)
Presiding Judge,
Industrial Tribunal-cum-Labour Court,
Shimla, District Shimla, HP.

INFORMATION & PUBLIC RELATIONS DEPARTMENT

NOTIFICATION

Shimla-2, *the* 5th *May,* 2017

No. Pub-B(15)-1/2017.—The Governor, Himachal Pradesh is pleased to create an ex-cadre post of Deputy Director (Song & drama) in Information and Public Relations Department for a period of 8 months till 31-12-2017 in public interest in the Pay Band of Rs. 10300-34800+5400 Grade Pay.

2. Consequent upon the creation of above post the Governor, Himachal Pradesh is further pleased to re-employ Shri Mela Ram, retired as Deputy Director (Song and Drama) on the same post in the Information & Public Relations Department for above period *i.e.* commencing from the date of his joining as such till 31-12-2017.

3. The terms and conditions of re-employment will be issued separately.

By order,
Sd/-
Chief Secretary (I&PR).

GENERAL ADMINISTRATION DEPARTMENT
SECTION-A

NOTIFICATION

Shimla-2 *the* 12*th May*, 2017

No. GAD-A(A)9-1/2001-II.—THE GOVERNMENT OF HIMACHAL PRADESH ANNOUNCES WITH MOST PROFOUND REGRET THAT SHRI KARAN SINGH, HON'BLE CABINET MINISTER, HIMACHAL PRADESH PASSED AWAY AT NEW DELHI TODAY ON 12TH MAY, 2017. AS A MARK OF RESPECT TO THE DEPARTED DIGNITARY, THE NATIONAL FLAG WILL BE FLOWN AT HALF MAST ON ALL GOVERNMENT BUILDINGS FLYING THIS REGULARLY IN THE STATE CAPITAL (SHIMLA) AND AT THE PLACE OF FUNERAL *i.e.* KULLU AND THERE WILL BE NO OFFICIAL PUBLIC ENTERTAINMENT AT ABOVE PLACES.

Sd/-
(TARUN SHRIDHAR),
Chief Secretary,

GENERAL ADMINISTRATION DEPARTMENT
SECTION-A

RESOLUTION OF THE GOVERNMENT

Shimla-2 *the* 12*th May,* 2017

No. GAD-A(A)9-1/2001-II.—THE NEWS OF DEATH OF OUR CABINET MINISTER, SHRI KARAN SINGH, ON 12TH MAY, 2017 CAME AS A GREAT SHOCK TO THE COUNCIL OF MINISTERS. SHRI KARAN SINGH REMAINED MINISTER OF STATE, PRIMARY EDUCATION (INDEPENDENT CHARGE) DURING 1998-2003. HE WAS INDUCTED AS CABINET MINISTER FOR AYURVEDA & CO-OPERATION ON 27-08-2015. THE STATE HAS LOST A POPULAR LEADER. THE COUNCIL OF MINISTERS RECORDS ITS PROFOUND GRIEF AT THIS IRREPARABLE LOSS TO THE STATE, AND OFFERS ITS DEEPEST SYMPATHY TO SMT. SHIVANI SINGH AND THE MEMBERS OF THE FAMILY IN THEIR BEREAVEMENT.

BY ORDER AND IN THE NAME OF GOVERNOR OF HIMACHAL PRADESH.

Sd/-
(TARUN SHRIDHAR),
Chief Secretary.

In the Court of Shri Hemis Negi, H.A.S., Sub Divisional Magistrate Shimla (Urban), District Shimla, Himachal Pradesh

Soni Kumari d/o Shri Kaleshwar Urave Singh, r/o Asha Ram Building Phagli, Bye Pass Shimla, Tehsil and District Shimla, H.P. . . *Applicant.*

Versus

General Public .. *Respondent.*

Application under section 13(3) of Birth and Death Registration Act, 1969.

Whereas Soni Kumari d/o Shri Kaleshwar Urave Singh, r/o Asha Ram Building Phagli, Bye Pass Shimla, Tehsil and District Shimla, H.P. has preferred an application to the undersigned for registration of the date of death of her brother namely Ajay Kumar Urave s/o Kaleshwar Singh Urave (DOD 19-1-2012) in the record of Municipal Corporation, Shimla.

Therefore, this proclamation, the General Public is hereby informed that any person having any objection for entry as to date of death mentioned above, may submit his objection in writing in this court on or before 09-06-2017 failing which no objection will be entertained after expiry of date and will be decided accordingly.

Given under my hand and seal of the Court on this 9th day of May, 2017.

Seal.

HEMIS NEGI,
Sub-Divisional Magistrate,
Shimla (Urban).

ब अदालत सहायक समाहर्ता द्वितीय श्रेणी जलोग, उप–तहसील जलोग, जिला शिमला, हि0 प्र0

बाद संख्या : 2-XIII-B-1/17 तारीख मजरूआ : 24–03–2017

कन्हैया लाल पुत्र देवीसरन, निवासी महाल साल, उप–तहसील जलोग, जिला शिमला, हि0 प्र0

दरख्वस्त बराये दरुस्ती नाम।

बनाम

आम जनता

हरगाह खास व आम को बजरिया नोटिस सूचित किया जाता है कि कन्हैया लाल पुत्र देवीसरन, निवासी महाल साल, परगना सराज, उप–तहसील जलोग, जिला शिमला, हि0 प्र0 ने इस न्यायालय में प्रार्थना–पत्र गुजार कर अभिव्यक्त किया है कि उसका नाम राजस्व रिकार्ड मौजा साल में कनिहया दर्ज है जो कि गलत दर्ज हुआ है। परन्तु स्कूल प्रमाण पत्र, नकल परिवार रजिस्टर, आधार कार्ड तथा मौजा जैशी, पटवार सर्कल चेबडी, तहसील सुन्नी के रिकार्ड में कन्हैया लाल पुत्र देवीसरन दर्ज कागजात है जो कि सही व सत्य है। प्रार्थी ने मौजा साल के राजस्व रिकार्ड में भी सही नाम दर्ज करने हेतु प्रार्थना पत्र प्रस्तुत किया है।

अतः इस प्रार्थना पत्र बारे आम जनता को सूचित किया जाता है कि यदि किसी व्यक्ति को नाम दरुस्त करने में कोई एतराज हो तो वह अपना एतराज लिखित रुप में दिनांक 06–06–2017 अथवा इससे पूर्व इस न्यायालय को प्रस्तुत करें। तदोपरान्त कोई आपत्ति मान्य न होगी।

हमारे हस्ताक्षर व मोहर अदालत से आज दिनांक 04–05–2017 को जारी हुआ।

मोहर।

हस्ताक्षरित / –
सहायक समाहर्ता द्वितीय श्रेणी,
जलोग, जिला शिमला, हि0 प्र0।

नियन्त्रक, मुद्रण तथा लेखन सामग्री, हिमाचल प्रदेश, शिमला–5 द्वारा मुद्रित तथा प्रकाशित
इलेक्ट्रॉनिक हस्ताक्षरित राजपत्र, वैबसाइट http://rajpatrahimachal.nic.in पर उपलब्ध है एवम् ऑनलाइन सत्यापित किया जा सकता है